United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

PETITIONER

v.

FEDERAL TRADE COMMISSION

RESPONDENT

On Petition to Review an Order of the Federal Trade Commission

BRIEF FOR RESPONDENT

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Petitioner

v.

FEDERAL TRADE COMMISSION

Respondent

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BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Commission's finding that petitioner violated Section 2(f) of the Clayton Act by knowingly inducing or receiving discriminations in the price of private label milk and other dairy products from its supplier, the Borden Company.

2. Whether substantial evidence supports the Commission's finding that petitioner failed to bring its conduct within available statutory defenses.

3. Whether the order prohibiting the proven violations was within the Commission's broad remedial authority, properly included provisions to make it effective, and properly included restraints against any additional violations.

RELEVANT STATUTORY PROVISIONS

The following statutes, set forth in the relevant part in Supplement A to this brief, are involved in this appeal: Sections 2(a), (b) and (f) of the amended Clayton Act, 15 U.S.C. § 13(a), (b) and (f). Section 5 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 45, involved in the proceedings before the Commission, is also set forth in relevant part in Supplement A.

STATEMENT OF THE CASE

This case arises upon a petition to review an order to cease and desist issued by the Federal Trade Commission ("Commission") at the conclusion of an administrative proceeding upon a complaint alleging in part that petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), and the Borden Company ("Borden") engaged in practices which restricted competition in the sale and distribution of milk in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 45, and that A&P knowingly induced and received discriminatory prices from Borden in violation of Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f).

Proceedings Before the Commission

A. The Complaint, answer and hearing

The Commission's complaint alleged that A&P is engaged in the operation of a large chain of 4500 retail grocery stores in the United States and Canada (App. 25).[1/] Included among A&P's retail

1/ The relevant material in the record is in the Joint Appendix and Supplemental Joint Appendix. The references herein to the record are shown as "App." and "Supp. App." "Pet. Br." refers to A&P's brief in this Court.

grocery chain stores, the complaint alleges, are approximately 260 or more stores in Illinois, Indiana and Iowa which comprise the Chicago Division. A&P, the complaint states, is engaged in commerce and competes with other firms also engaged in commerce in the purchase for resale and resale of grocery and household products including milk and other dairy products of like grade and quality which are purchased from the same or competitive sellers (App. 26).

The complaint further states that Borden, through four operating divisions, manages approximately 200 plants in the United States and Canada, one of which, the Dairy and Services Division, conducts a diversified dairy business. While operating a large number of receiving stations, processing and manufacturing plants, and distribution depots located in various states of the United States, the complaint alleges, Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States including the States of Illinois, Indiana, and Iowa, for use, consumption and resale therein. The complaint alleges that in the course of its business Borden transports raw milk from dairy farms to its receiving stations and processing plants located in states other than the state of origin. It then transports milk from states where it is processed to other states in the United States. Borden also sells and distributes its product to purchasers located in the same state as that in which the milk is processed (App. 27).

The complaint charges that A&P entered into an agreement with Borden for the supply of milk and other dairy products packaged under A&P's own private label to the majority of the stores of A&P's Chicago Division; that at the time Borden tendered to

A&P its final offer, the offer which was accepted to form the said agreement, Borden informed A&P that the offer was granted to meet competition of other offers in A&P's possession; and that A&P accepted Borden's offer with knowledge that Borden's offering price was substantially lower than that offered by the only other competitive bidder and without notifying Borden of that fact. The complaint alleges in Count I that A&P's failure to so inform Borden, after being told the offer was made on a meeting competition basis, constituted a violation of the policy of the Clayton Act and, was a violation of Section 5 of the Federal Trade Commission Act (App. 28).

The complaint charges in Count II that A&P knowingly induced or received prices discriminatory within the meaning of Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a), that A&P knew or should have known that such prices constituted discriminations under Section 2(a), and consequently that such acts and practices violated Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f) (App. 28-29).

Finally, Count III of the complaint charges that A&P and Borden entered into a combination which had the tendency or effect of stablizing and maintaining prices of milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act (App. 29-30).

In its Answer A&P admitted that it has been in competition with other firms engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, that some of said products are of like grade and quality, and that some are purchased from the same or competitive sellers.

A&P further admitted that beginning in 1965, it purchased private label dairy products from Borden for resale in a majority of stores of A&P's Chicago Division. A&P denied, however, either entering into an agreement, formed at the time that Borden's final offer was made, or knowing that Borden's offer was substantially lower than that of the only other competitive bidder. A&P also denied entering into a combination with Borden to maintain the resale price A&P's private label milk and other dairy products. A&P denied having violated Section 5 of the Federal Trade Commission Act or Section 2(f) of the Clayton Act (App. 31-34).

A&P also asserted as affirmative defenses that any differentials in Borden's prices to it were cost justified, that it relied upon Borden's representation that Borden's prices to A&P were lawful prices, and that A&P believed such prices were no lower than those offered by Borden to A&P's competitors (App. 34-36).

Borden also filed an Answer in which while admitting supplying A&P's Chicago Division with private label dairy products, it denied any discriminatory pricing or that it entered into a course of conduct in violation of Section 5 of the Federal Trade Commission Act.

The Administrative Law Judge conducted extensive hearings and received into the record both a substantial amount of testimony and numerous documentary exhibits concerning the allegations of the complaint.

B. The Administrative Law Judge's initial decision

After the hearing the Administrative Law Judge issued his initial decision. With respect to Count I, the Law Judge found that A&P "acted unfairly and deceptively in purchasing milk and

dairy products from Borden in that it accepted a price offer from Borden tendered on a meeting competition basis when in fact such meeting competition defense was not available" and further that A&P did so "without informing Borden of this fact * * * in violation of Section 5 of the Federal Trade Commission Act," (App. 1001). The Law Judge next concluded under Count II of the complaint that A&P "knowingly induced or received a discrimination in price in the purchase of fluid milk and other dairy products" in violation of Section 2(f) of the Clayton Act (id.). Finally, upon finding no combination between A&P and Borden having the tendency or effect of stabilizing and maintaining prices for milk and other dairy products in violation of Section 5 of the Federal Trade Commission Act, the Law Judge dismissed Count III of the complaint (App. 1002).

C. The Commission's decision

A&P appealed to the Commission from the Law Judge's initial decision.[2/] Upon full review of the entire record in the proceeding, including extensive briefing and oral argument, the Commission on April 29, 1976, issued its opinion and order adopting and affirming the Law Judge's findings concerning Count II of the complaint (App. 1019, 1023). The Commission found that A&P violated Section 2(f) (App. 1030, 1069). Specifically, the Commission found that there were indeed discriminations in the prices offered by Borden to A&P and to A&P's competitors (App. 1033), that A&P knew

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2/ Complaint counsel appealed the Law Judge's dismissal of Count III. However the Commission affirmed the dismissal and Count III (which involved A&P and Borden) is not before the Court.

or should have known that it was a beneficiary of an unlawful price discrimination (App. 1037), and that A&P had not established the defenses of meeting competition (App. 1038) or cost justification (App. 1057).

As to Count I, the Commission decided that the conduct of A&P in not informing Borden of the fact that the meeting competition defense was not available to it was not a violation of Section 5 of the Federal Trade Commission Act (App. 1025-28).

The Commission thereupon issued its order to cease and desist prohibiting the practices found to be unlawful (App. 1019-20).

The Facts

A&P, a Maryland corporation, was engaged in the operation of approximately 4,329 stores in 36 states and Canada which carry a full range of grocery products. Its principal office and place of business was located at 420 Lexington Avenue, New York, New York. A&P's annual sales for fiscal years 1969 and 1970 were in excess of $5,400,000,000 and $5,700,000,000, respectively (App. 25, 31). A&P's Chicago Division was comprised of more than 200 stores located in portions of Illinois and Indiana (App. 26, 31).

In November 1964, Mr. Herschel Smith, A&P's National Director of Purchases in New York, advised A&P's Divisional Purchasing Directors of the savings that could be realized by switching from brand label milk (<u>i.e.</u>, milk bearing a processor's label) to private label milk (<u>i.e.</u>, milk bearing the retailer's name or brand) and advised them to look into the possibility of purchasing private label milk in their areas (App. 1954-55, 1144-45). Soon thereafter, A&P requested Borden to submit a private label offer for the Chicago area where Borden had served A&P since 1950.

During the period February-August 1965 Borden made several offers to A&P. There were quotations in February, May, July and August, in which Borden expanded the number of products to be covered by the private label program, the areas to be served and the amount of savings available to A&P. The August offer finally covered 11 milk and dairy items, virtually all of A&P's Chicago Unit, and provided A&P savings of $410,000 from A&P's then current cost, if it switched 100% to private label and continued to purchase the same volume (App. 3232, 3240-41, 3260-75, 3276-83, 3285-3305, 3337-70, 3371-76).

Retention of the A&P business was a "life or death" proposition for Borden. It had just opened a brand new plant at Woodstock, Illinois, at a cost of over $5 million (App. 3228). A&P's business represented more than 55% of Borden's wholesale route business out of this plant and 25% of the plant's entire production (App. 3210, 3377-80). During the negotiations Borden submitted detailed cost data to A&P in connection with its various offers (App. 3274, 3276, 3280, 3281, 3305-27). In connection with one of its early offers, in May 1965, it stressed to A&P that it expected almost no profit from the A&P contract, but that it was presenting such a bid because A&P's business was vital to Borden's efficient use of its Woodstock plant (App. 3276, 3280, 3281). The A&P volume was clearly essential to the operation of this plant (App. 3210, 3377-80).

During the negotiations "A&P maintained unwavering pressure upon Borden to arrive at the prices finally agreed upon. It solicited a private label arrangement, first only for its Chicago-Calumet area, then later for its outside areas, it hammered down Borden's successive bids and even when informed that the bid was at or close to Borden's costs put the matter up for outside bids" (App. 943, 1023). Thus after finally driving Borden down to $410,000 savings from then current costs, in August 1965, it opened up the negotiations to bids from other companies. At this time, Borden warned A&P that some of its competitors were desperate for volume and were likely to submit bids which included only out of pocket or direct costs leaving out all fixed charges ("anyhow accounting") (App. 930, 1023).

A&P subsequently received an offer from Bowman Dairy. It was lower than Borden's August offer. A&P notified Borden of the lower competitive offer and gave Borden the opportunity to make another offer (App. 2147).

For Borden's part, Mr. Tarr, its Sales Manager, was unable to get any concrete idea from A&P as to what the competitor had bid. He was told that $50,000 more would only be a drop in the bucket (App. 2148-49). Borden was of the opinion that the competitive offer was based on "anyhow accounting" and informed A&P of this belief. Borden then determined how much additional savings to A&P would be involved if it used only its direct costs. It found that this would involve a little more than doubling of its prior offer. It then doubled its August offer from $410,000 savings to $820,000 in savings (App. 1721-22, 1723-24, 1733-34, 1739-40, 1791-92, 2147-48, 2150-2161; see App. 3413 and 3414-18).

Accordingly, in the first week of September, Borden returned to A&P with an offer of annual savings of $820,000. This offer had not yet been spread to the various products and did not specify the cost of A&P for each product. A&P was aware of this fact and was also told that this offer was being made solely on the basis of the meeting of the competitive offer of which Borden had been informed by A&P. Borden also again informed A&P that it believed the competitive offer was based upon "anyhow accounting." A&P informed Borden that this new offer was "in the ball-park" of the competing offer and that it appeared to be satisfactory. Borden was told to spread the offer over the product line (App. 1722, 1723-24, 1733-34, 1739-41, 1791-92, 2150-51, 3418, 3419-42, 3443-44; Supp. App. 6453).

In spreading the offer over the product line Borden at first included glass gallon jugs of homogenized and 2% milk, in order to try to minimize its losses. However, A&P rejected this offer, telling Borden that such inclusion was not fair to other bidders who "did not bid on glass gallons." Bowman's bid did include glass gallons (App. 3385-3406), but A&P simply did not want to sell private label milk in glass gallons (App. 1888-91). Borden then re-spread the savings over the 11 original private label items, leaving out the glass gallons.

Later in September A&P told Borden that its $820,000 offer was still not competitive and that it must "sharpen your pencil" (App. 2186). This was despite the fact that the Bowman offer in its hands provided savings of only some $737,000 (App. 3479).

Borden then presented its final bid to A&P on September 21, 1965. At that time it very expressly warned A&P that the offer was being made on a meeting competition basis. The Borden representative stated, "We know of no other way to justify this, You have to accept it on that basis." The A&P representative replied to the effect, "Ralph, you don't need to worry. I read you loud and clear * * *" (App. 1743-44). Borden also warned A&P to save the competitive offers and warned again that the competitive offers were based on "anyhow accounting" (App. 3473-76). The A&P representative admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (App. 1893-1912).

A&P determined that Borden's offer was "substantially better" than Bowman's (App. 1160-61, 2017-18, 4295-4334) and accepted it (App. 2017, 3485-86). In fact, Borden's final offer was considerably lower than Bowman's -- $82,664 lower.

A&P's Mr. Schmidt then requested a letter from Borden stating that Borden's quoted prices were proportionately available to competitors of A&P (App. 1894, 1897). Instead, Borden's letter to A&P stated only that the quoted prices were legal and that Borden would defend them (App. 4460). A&P's home office executive who reviewed the offer recognized that this letter did not meet A&P's requirements, but approved the selection of Borden anyway (App. 2010).

Two months after the beginning of the private label contract with A&P, Borden offered similar service terms as those granted A&P to all its other retail grocery customers in the Chicago area purchasing Borden label products,[3/] with the exception that these competitors received only a 2% discount instead of the substantial price cut A&P had received on private label. In 1966, as a result of an increase in labor and container costs, Borden approached A&P to negotiate an increase in its private label prices (App. 1391-94, 4247-49, 3511, 4086-4294). Although specifically advised that such increases had been passed on to its competitors, A&P refused to accept the private label adjustments, although it did accept these increases on Borden label products (App. 1394-95, 3514, 4020). Only a year later in the Spring of 1967, did A&P finally accept slightly more than half of the proposed private label cost increase (App. 1399, 3550, 3559-62, 4020; Supp. App. 6456).

3/ A&P in Paragraph III-6 of an Admission (App. 111), filed with the Commission on March 12, 1973, made the following admission concerning the grade and quality of Borden's fluid milk products involved in this case:

> * * * [S]ubstantially all of the fluid milk products Borden supplied under A&P's private label to A&P stores [in the area of complaint counsel's proof] during the period November 1965-1970 were physically and chemically identical to the equivalent products contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and suburbs", Gary, Hammond and Valparaiso areas.

ARGUMENT

Preliminary Statement

As this Court has recognized, a buyer's knowing inducement or receipt of a discriminatory price from his supplier is a violation of Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f). American Motor Specialties Co. v. FTC, 278 F.2d 225, 228-229 (2d Cir.), cert. denied, 364 U.S. 884 (1960). See also Kroger Co. v. FTC, 438 F.2d 1372, 1380 (6th Cir.), cert. denied, 404 U.S. 871 (1971); General Auto Supplies, Inc. v. FTC, 346 F.2d 311, 317 (7th Cir.), cert. dismissed, 382 U.S. 923 (1965); Mid-South Distributors v. FTC, 287 F.2d 512, 520 (5th Cir.), cert. denied, 368 U.S. 838 (1961). Section 2(f) was enacted to make the statute's prohibition of price discrimination applicable to buyers. Automatic Canteen Co. v. FTC, 346 U.S. 61, 70 (1953).

In this Court the issues presented by A&P concern (1) whether substantial evidence supports the Commission's finding that A&P knowingly induced or received a discriminatory price in its purchase of private label milk and other dairy products in violation of Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f), (2) whether the Commission correctly determined that A&P's conduct did not fall within the defenses of meeting competition and cost justification, and (3) whether the sanctions of the Commission's order were warranted by the proven violations and whether the Commission properly exercised its discretion in its choice of remedy.

The following well-established principles are pertinent in assessing these contentions. As this Court held in Callaghan & Co. v. FTC, 163 F.2d 359, 372 (2d Cir. 1947), a court on review of the Commission's findings or order is not to weigh the evidence to

determine in which direction it preponderates. The Court stated the rule as follows:

> It is well settled that in reviewing an order of the Federal Trade Commission in respect to the sufficiency of the findings upon which it is based our power is limited to the determination of whether there is substantial evidence to support them. It is not enough for the petitioners to persuade us that there was evidence on which the facts as claimed by them might have been found, or inferences favorable to them might have been drawn, by the Commission. Sec. 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c), makes all the findings of the Commission which are supported by the evidence conclusive upon us. The existence in the record of substantial evidence to support the findings is a matter which must appear to our satisfaction if the order is to be given effect but the weight to be given established facts and what reasonable inferences may be drawn from them is within the sole province of the Commission. 163 F.2d at 372.

The substantial-evidence rule is satisfied if there is of record "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' * * * This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106 [1942]; Keele Hair & Scalp Specialists, Inc. v. FTC, 275 F.2d 18, 21 [5th Cir. 1970]." Consolo v. FMC, 383 U.S. 607, 619-20 (1966). See also Standard Distributors, Inc. v. FTC, 211 F.2d 7, 12 (2d Cir. 1954); Fioret Sales Co., Inc. v. FTC, 100 F.2d 358, 359 (2d Cir. 1938).

I. Substantial evidence supports the Commission's finding that A&P knowingly induced and received discriminatory prices in its purchase of private label milk and other dairy products from Borden in violation of Section 2(f) of the Clayton Act

A. Substantial evidence supports the Commission's finding that the prohibited receipt of discriminatory prices took place in commerce

Borden's Woodstock, Illinois, facility supplied all of A&P's requirements under the private label contract and also supplied Borden label products to A&P and many of its competitors in the relevant market areas (App. 1609-12, 4086-4294; Supp. App. 6458-60). Moreover, approximately sixty per cent of the milk processed at Woodstock originated at farms located in Wisconsin (App. 1613-14, 3136). Finally, in no way did processing at Woodstock interrupt the flow of milk from the farm to A&P's stores (App. 1615-17, 3158-62, 2482-84). Accordingly, A&P's purchases of private label milk were in commerce within the meaning of Section 2(f), 15 U.S.C. § 13(f). "[M]ilk produced in one state and processed and distributed in another state does not lose its interstate character because of standardization, and pasteurization." Foremost Dairies Inc. v. FTC, 348 F.2d 674, 677 (5th Cir.), cert. denied, 382 U.S. 959 (1965). See also Dean Milk Co. v. FTC, 395 F.2d 696, 714-15 (7th Cir. 1968); Universal Milk Bottle Service v. United States, 188 F.2d 959, 963-64 (6th Cir. 1951); Pevely Dairy Co. v. United States, 178 F.2d 363, 366 (8th Cir. 1949); Glowacki v. Borden, Inc., 420 F. Supp. 348, 351 (N.D. Ill. 1976).

Further, the private label contract was multi-state in nature. A&P's Chicago Unit consisted of approximately 260 stores in three states: Illinois, Indiana, and Iowa (App. 1839-42). Many of these

stores were located in Indiana (App. 3342, 3345, 3395). The contract called for Borden to supply private label milk to all A&P Chicago Unit stores in Illinois and Indiana (App. 3445-72). Under such circumstances, the transaction embodied in the contract was in commerce within the meaning of Section 2(f). See Beatrice Foods Co., 76 F.T.C. 719, 747 (1969), aff'd sub nom., Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971); Dean Milk Co., 68 F.T.C. 710, 781-85 (1965), aff'd, 395 F.2d 696 (7th Cir. 1968).

A&P contends (Pet. Br. 72-76) that because Borden's Woodstock processing plant is located in Illinois, the Commission has failed to meet the "commerce" requirement of Section 2(a) because it has failed to satisfy the commerce requirement with respect to A&P's receipt of discriminatory prices in Illinois. 4 / The argument lacks merit. The Commission found that most of the raw milk processed at the Woodstock facility had been shipped from Wisconsin farms, and that this plant filled all of A&P's requirements under the private label agreement (App. 1032). Under these circumstances, the Commission's finding that private label purchases by A&P's Illinois stores were in commerce was in accordance with the rule in Foremost Dairies and Dean Milk Co., supra p. 15.

The factual circumstances in Foremost are practically identical to those now before the Court. Raw milk was imported from dairy

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4 / Of course, A&P does not contest the fact that its purchases for its Indiana stores were in interstate commerce.

farms in Colorado to Foremost's processing plant in Alburquerque, New Mexico, where it was

> * * * unloaded from the trucks, tested, standardized to a uniform butterfat content by the addition of other milk of a predetermined butterfat ratio, pasteurized, in some cases homogenized, and bottled. [Foremost Dairies, Inc. v. FTC, supra, 348 F.2d at 676.]

There was also testimony that a truck tank of raw milk is usually processed in an hour and that the milk moved in and out of the processing facility in one day (id. at 676-77). After next observing the hearing examiner's finding upon these facts that "there was a 'constant flow' of milk which originated outside of New Mexico, and that this milk remained in interstate commerce from its point of origin until delivery to Foremost's wholesale customers in Alburquerque," the court ruled that the milk sales were "in commerce" within the meaning of Section 2(a) (id. at 677). Moreover, it was these very functions which the court in Foremost characterized as "a rather negligible processing operation" (id.).

The facts in the present case are even stronger than those of Foremost, in establishing interstate commerce. The record here reveals that Borden [illegible] fulfill its customers' needs, including A&P's private label purchases,[5] obtained approximately 60% of its raw milk requirements from out-of-state in connection with the processing of certain milk and dairy products at its Woodstock, Illinois plant (App. 1032, 923-24). Borden's practices at its Woodstock operations was to purchase raw milk as needed for its customer demands, process it and deliver it as quickly as possible (App. 1616-17). Milk was not stored more than approximately 24 hours

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5/ A&P represented 55 percent of Borden's wholesale route business and 25 percent of its Woodstock plant production (App. 3210, 3377-80).

(App. 1616-17). At the processing plant milk was inspected, cooled, standardized and in some cases fortified (App. 1615-17, 3169-72). By A&P's own witness' testimony it is shown that these steps did not affect the milk's status as raw milk (App. 3169-72). It was then processed. Processing (pasteurization and homogenization) of the major fluid milk items - milk and cream which accounted for over 70 percent of Borden's sales - is a nearly instantaneous mechanical procedure which does not alter the product's chemical composition (App. 1615-16, 3169-72, 2483-84). Pasteurization is a legal requirement for milk being shipped in interstate commerce for consumption (App. 3167-68, 2481). Thus, as in Foremost and Dean, the milk remained in interstate commerce from its point of origin until delivery to Borden's customers in Illinois.[6]

Against these facts, the numerous authorities cited by A&P (Pet. Br. 72-75) are readily distinguished. A&P's purchases from Borden in Illinois did indeed "cross a state line" unlike the transactions in Gulf Oil Corp. v. Copp. Paving Co., 419 U.S. 186, 200 (1974); Bowen v. New York News, Inc., 522 F.2d 1242, 1246 n. 2 (2d Cir. 1975); Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 766 (7th Cir. 1973), cert. denied, 414 U.S. 1146 (1974); Borden Co. v. FTC, 339 F.2d 953, 955 (7th Cir. 1964); Jones v. Metzger Dairies, Inc., 334 F.2d 919, 922 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965); Willard Dairy Corp. v.

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6 / In a recent private suit under the Robinson-Patman Act against Borden, a district court considered at length virtually the same argument put forward here by A&P and held that the processing of raw milk into fluid milk at Borden's Woodstock plant did not break the flow of commerce. Glowacki v. Borden, Inc., supra, 420 F. Supp. at 351.

National Dairy Products Corp., 309 F.2d 943, 946 (6th Cir. 1962), cert. denied, 373 U.S. 934 (1963). Nor in the instant case was there the "extensive process involved in refining crude oil into gasoline" resulting in an "alteration of the nature of the product" found by the court in Bacon v. Texaco, Inc., 503 F.2d 946, 948 (5th Cir. 1974), cert. denied, 420 U.S. 1005 (1975), or the "highly complex process" which the court in Belliston v. Texaco, Inc., 455 F.2d 175, 180 (10th Cir.), cert. denied, 408 U.S. 928 (1972), as distinguished from the "minimal changes" involved in processing milk. Further A&P's reliance (Pet. Br. 73-74) upon Red Apple Supermarkets, Inc. v. Deltown Foods, Inc., 419 F. Supp. 1256 (S.D.N.Y. 1976), is misplaced. Unlike the factual situations in Foremost and in the instant proceeding, the milk involved in Red Apple was subjected to "considerably more processing," and resulting in "a significant physical change" in the final product through its containing "significantly less butterfat" than "the milk which had previously moved in interstate commerce." 419 F. Supp. at 1259. Cf. Glowacki v. Borden, supra (production of low fat and skim milk from raw milk in Borden's Woodstock plant did not amount to a significant change). 7/

A&P further argues (Pet. Br. 74-75) that the multi-state nature of the private label transaction is an insufficient alternative basis for the Commission's finding of jurisdiction and cites Mayer Paving & Asphalt Co., supra, in support of its position.

7/ The Administrative Law Judge and the Commission found, for example, that in the case of certain milk products, such as whipped cream, sour cream, etc., which did undergo significant physical change, the flow of commerce was terminated at the processing plant. However, these products were a "relatively insignificant part of the contract" (App. 982-83).

Again, A&P's reliance upon the cited authority is misplaced. In Mayer Paving, the court held that an intrastate purchase is not in commerce notwithstanding the "interstate character of [the seller's] business" (emphasis added). In the instant matter, however, the interstate character of Borden's business, as distinguished from the private label transaction, was in no way relied upon by the Commission (emphasis added). A&P's purchases from Borden were under a contract which covered sales and deliveries not only to its stores in Illinois, but also sales and deliveries in Indiana and elsewhere as well. The contract was not severable (App. 982). In fact, A&P had only contacted dairies who could fulfill all of its requirements (App. 1855, 3334) and was not interested in an offer to supply only a part of the stores of this Division (App. 1856, 3384, 3407-09). The terms of price and service afforded to any store in A&P's Chicago Unit were thus dependent upon the entire contract to purchase milk and dairy products throughout the multi-state division. Accordingly, every sale by Borden to A&P, under this agreement, was in interstate commerce, because it was dependent upon Borden's serving A&P's entire needs in the multi-state area.

Consequently, it was entirely proper for the Commission to find that A&P's private label purchases in Illinois took place in commerce.

Although A&P admits its Indiana purchases were in commerce, it nevertheless asserts (Pet. Br. 76-78) that the Commission failed to show that the injured competitors in Indiana were representative and that, therefore, the Commission had not proven its case in this area, either. The argument is without substance

on two grounds. First, the Commission is not required to make such a showing, and A&P has cited no authority to the contrary. "[T]he Robinson-Patman Act requires consideration of secondary line injury on a location by location basis. Each local competitive area, each * * * store location, becomes the competitive environment within which the potential effect on competition * * * must be examined." Beatrice Foods Co., 76 F.T.C. 719, 805 (1969), aff'd sub nom., Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). The record discloses that in such A&P store locations in Indiana, unfavored customers of Borden incurred substantial injury as a result of Borden's reduced prices to A&P under the private label agreement. (See infra, pp. 21-22.) Second, the unfavored competitors selected by complaint counsel indeed were representative. Purchases of selected unfavored competitors in the Gary-Hammond and Valparaiso areas constituted more than two-thirds of all Borden wholesale sales to stores other than A&P on Borden's Indiana wholesale routes (App. 5784, 3671). These customers also were clearly the larger, super-market sized customers on these routes (App. 5784).

B. Substantial evidence supports the Commission's finding that the prices induced and received by A&P were discriminatory

The record discloses that the prices A&P paid Borden for private label milk were considerably less than those paid by A&P's competitors for their requirements of Borden label milk. 8/ In the Gary-Hammond and Valparaiso areas of Indiana, unfavored competitors purchased their milk requirements from Borden at lower discounts

8/ Private label milk was not made available by Borden to competitors of A&P.

and at higher prices than did A&P under the private label agreement. Burger's Market, which purchased up to five times the milk volume of its A&P competitors (App. 3671, 5784), sustained a price discrimination of $3,468.77 or 14% between October 1966 and March 1967 and $11,506.15 or 15.7% between June 1969 and March 1970 (App. 3678, 3679, 937). During the same two periods Model Food Center, whose Borden milk purchases were comparable to those of its A&P competitors (App. 1109-1115, 3671). suffered a discrimination of $2,297 or 22.5% and $4,138 or 16.3%, respectively (App. 3719, 3678, 937). Had it been charged A&P private label prices for its milk purchases from Borden, Wallies Market, with Borden milk purchases also comparable to those of competing A&P stores (App. 3671), would have saved $2,193 or 17.5% in the earlier period and $2,203 or 17.6% in the later period (App. 3929, 3678, 937).9/ Wilco Food Center, which purchased more than twice as much milk from Borden than its A&P competitors (App. 3671), incurred as a result of the A&P private label agreement a price discrimination of $4,550 or 14.5% in the earlier period and $4,433 or 6.6% in the later period (App. 3959, 3678, 938). The combined purchases of five Tittle stores, whose average Borden milk purchases exceeded those of its A&P competitors (App. 3671), resulted in price differences of $13,804 or 15% in the earlier period and $12,104 or 6.3% in the later period (App. 3678).10/

9/ Wallies only purchased milk from Borden through November 1969, so that the later period in this case extended only for six months rather than for the full ten months.

10/ The Tittle store in Valparaiso, Indiana, alone, was discriminated against in the amount of $7,603.75 (17.5%) during the earlier period and $6,984.77 (6.7%) during the later 10 month period (App. 3890, 3678). This store bought approximately three and one-half times as much milk from Borden as did the competing A&P store (App. 3671).

Similar discriminations in Borden milk prices were suffered by A&P's competitors in the area of Chicago and its suburbs. During February and March, 1966, Borden's discount to A&P under the private label contract was 36.6% (App. 3673-76). The discount on Borden label milk to Mayfair Foods for the same two months, however, was only 30%. Similarly, while Jim's Groceries received rebates for their Borden label milk purchases during February and March, 1966, of 23% and 22.8% respectively (App. 3673-76), A&P's competing stores received a discount of 36.6% for the same period. Both of these unfavored competing stores purchased as much, if not more, milk from Borden than did their A&P competitors (App. 5228, 5535, 5537; Supp. App. 6461-68). Accordingly, the Law Judge's finding (App. 941), adopted by the Commission (App. 1023), was that even if the competing A&P stores had earned the published discounts of 2% for limited service and another 2% for central billing, Jim's Groceries sustained a discrimination in excess of 10.4%.

These discriminations are based upon the comparison of prices paid by A&P's competitors for those items included under the Borden-A&P private label contract. This is a proper basis for determining the extent of discrimination, according to precedent. Beatrice Foods Co., supra, 76 F.T.C. at 806. Further, "evidence of discrimination in only one area is sufficient to meet the requirements of the Act" (id. at 681).

Accordingly, the record amply supports the existence of a discrimination.

A&P challenges (Pet. Br. 64-71) the evidence as failing to demonstrate that A&P was the beneficiary of a price discrimination. It first argues (Pet. Br. 64-65) that App. 3673-76, which compares discounts granted to A&P's larger cash competitors on Borden's O'Hare routes with discounts granted to A&P for private label purchases is defective, because it compares total purchases of A&P's competitors with only private label purchases of A&P. A&P misunderstands the exhibit. App. 3673-76 compares only percentage discounts. By comparing the price paid by A&P for private label items to Borden list prices on comparable items under the Borden label, Commission counsel was able to determine the effective discounts A&P received on private label purchases. Borden's discounts to the trade on Borden label products, however, were based upon a percentage of total purchases (App. 3580; Supp. App. 6457). Because the Commission had in hand for A&P's competitors Borden's total monthly sales and the dollar amount of the rebates paid on those purchases (App. 3673-76), the percentage discount to the competitors could be computed by comparing the rebate to any competitor with its total purchases. In this manner, a percentage discount could be computed for any item purchased by any A&P competitor, which discount could then be compared to the percentage discount granted to A&P on its private label purchase of the same item (App. 3673-76). Consequently, App. 3673-76 constitutes a valid comparison of the relative discounts on a percentage basis. The fact that A&P during the same period was also purchasing Borden label items is irrelevant.

A&P also challenges (Pet. Br. 65-66) the evidence (App. 3679-3997) of discriminations in Indiana. Only this time it urges error because these exhibits compare the injured customers' purchases of Borden label items from Borden of only those items covered by the Borden-A&P private label agreement with A&P's purchases of common items under private label, rather than on the basis of total purchases of all dairy products from Borden. The argument lacks merit. It was A&P and Borden, not the Commission, who selected the items covered by the private label agreement, and it was these items upon which A&P sought and obtained favored prices. Accordingly, the Commission was entirely correct in ruling (App. 1033) that the price comparison need not have included A&P's purchases of Borden label products. "[T]he proper inquiry here is whether [the buyer], by obtaining cheap milk under its own label was given a competitive advantage which it used to the potential injury of its competitors." Beatrice Foods Co., supra, 76 F.T.C. at 806.[11/] In Beatrice, Kroger's argument that both its Beatrice and its Kroger label milk should be aggregated in any comparison with purchases of

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11/ A&P's quotation of the Hearing Examiner's opinion in Beatrice (Pet. Br. 68) in support of its argument that Borden and A&P label sales should be aggregated is a misstatement of the case. The Commission, in reviewing the Examiner's opinion, specifically referenced this portion of the opinion, quoted the Examiner's conclusion that private label and advertised label sales should be aggregated, and held: "We disagree." 76 F.T.C. at 805. The Commission decision was affirmed on appeal. 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971).

Beatrice label milk by Kroger's non-favored competitors was specifically rejected by both the Commission and the court of appeals (id.).[12/]

A&P's reliance (Pet. Br. 69) upon Moog Industries, Inc. v. FTC, 238 F.2d 43 (8th Cir. 1956), aff'd, 355 U.S. 411 (1958), in support of its claim that A&P's private label purchases should be aggregated with its Borden label purchases before they are compared to prices paid by A&P's competitors for Borden label products, is misplaced. In Moog, "the price discriminations did not arise from uniform different prices for particular items," as in the instant proceeding involving a difference between the prices A&P and its competitors paid for Borden milk as a result of A&P's private label agreement with Borden. 238 F.2d at 50. Instead the discrimination in Moog arose from a "cumulative annual rebate plan" where "the parts * * * were catalogued, priced and sold, and were subject to rebate, as lines" (id.). The source of the discrimination in the instant proceeding was a contract providing

12/ By October 1966, the start of complaint counsel's first period of detailed proof for the Indiana customers, A&P was taking virtually no products under Borden label which could be purchased under A&P label (App. 3677). As found by the Administrative Law Judge, A&P's price on Borden's other minor by-products was the best generally available. (App. 957, Finding 122, see also App. 1248-58, 3681-3717, 5682-5873.) Thus, whether or not A&P's Borden label purchases were aggregated with its A&P label purchases would make little difference in the calculation of A&P's dollar advantage over its competitors on the dairy items in question. Cf. Kroger Co., at 1378-1379. Furthermore, A&P even cut back drastically on its purchases of all other items under Borden label. A&P's own exhibits reveal that its Indiana stores' purchases of such other Borden label items represented only 3.5% of its total purchases by October 1969 (App. 5785).

for lower prices to A&P on its purchase of specific dairy products, under private label, and not a volume purchase discount plan of the kind involved in Moog.[13/]

A&P next contends (Pet. Br. 66) that the discounts to unfavored competitors in both Indiana and Illinois were not computed properly. By claiming that only "readily ascertainable rebates" shown on the route books of Borden drivers were considered, A&P implies the existence of other rebates not of record. A&P also argues incompleteness with respect to records of the Indiana competitors (Pet. Br. 66-67). The argument is belied by the evidence. With reference to the Commission's subpoena calling for all documentation necessary to show the net price to the unfavored customers (App. 4335-42), Borden's official supervising the subpoena return, Mr. Rouse, made it clear that Borden was supplying a complete set of requested documents (App. 1824, 1827). And the Commission's accountant, Mr. Bitting, confirmed the testimony of various unfavored customers

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13/ A&P's reliance upon certain other cases (Pet. Br. 69 n. 57) cited in support of its theory that A&P's Borden label purchases should be aggregated with its private label requirements for price comparison purposes is similarly misplaced. In Best & Co., 72 F.T.C. 422 (1967), the source of the discrimination was an advertising allowance which covered a wide range of clothing styles from which Best chose the particular styles to be advertised. In the instant proceeding, however, the source of discrimination is a price discount which by contract covered only a more narrow group of items, A&P's private label dairy products. Similarly, in Joseph A. Kaplan & Sons, Inc., 63 F.T.C. 1308 (1963), aff'd, 347 F.2d 785 (D.C. Cir. 1965), the discriminatory allowance was granted on "a line of products promoted as a line" 63 F.T.C. at 1348. In Sylvania Electric Products, Inc., 51 F.T.C. 282 (1954), the discrimination also covered Sylvania's entire product line of radio receiving tubes. Lombino & Sons, Inc. v. Standard Fruit and Steamship Co., 1975-2 Trade Cas. ¶ 60,527 (S.D.N.Y. 1975), is irrelevant to the question at hand. The failure of the plaintiff therein to establish an unlawful price discrimination in the sale of a single item, bananas, resulted from a finding by the court that differences in banana prices were caused by the perishable nature of the product and changing market conditions. 1975-2 Trade Cas. ¶ 60,527 at 67,329.

that they either received one rebate check per month or were billed net (App. 1188-89, 1201-05, 1446-47, 1373, 1582-84, 1121-22). The accuracy and completeness of the evidence is also confirmed by Borden's rebate work sheets (App. 1827, 1933, 4364-90). Accordingly, the record amply supports the Law Judge's finding (App. 955), adopted by the Commission (App. 1023), that the data used by complaint counsel was authenticated sufficiently. Moreover, the testimony of non-favored competitors, Messrs. Lasorso (Mayfair Foods) and Cox (Jim's Groceries) does not support the contention as A&P improperly suggests. Mr. Lasorso was given one discount check per month off the "list price" which was a "percentage rebate" "on all products" across the board (App. 1501-02). Mr. Cox testified that he also received one rebate check per month based upon a percentage of everything sold during the previous month with the single exception of items on sale (App. 1350).

Next, A&P asserts that the price discrimination tabulations to certain competing customers (Cox and Lasorso) did not take into account price allowances that were not made available to A&P (Pet. Br. 66). The citations by A&P refer to specials which were sometimes offered by Borden to these customers on certain products. However, the record reveals that if and when such special allowances were given they were on small volume, by product items and would not substantially alter the over-all pricing pattern (App. 2071, 1236-45, 4367). Any effect on the figures in App. 3673-76, the Illinois tabulations, would be <u>de minimis</u>.

As for the Indiana customers, A&P argues that the rebate checks upon which the tabulations were based were incomplete (Pet. Br. 66-67). This is simply untrue. The completeness of the underlying data was shown through the Borden official who supervised the investigational subpoena return, the testimony of the injured competitors concerning the nature of the rebates they received from Borden, and Borden's contemporaneously prepared rebate worksheets, as noted above. A&P refers to several additional small payments to a few of the competing stores, which payments were not shown to be in the nature of rebates on milk purchases (App. 1831-33), and which were also shown to be de minimis when compared to the substantial price discrimination suffered by these competitors (App. 1187-92, 1455-57, 1462-64, 3678, 4391, 4488), as was noted by the Law Judge and the Commission (App. 954-55, 1023).

A&P next contends (Pet. Br. 67, 69-70) that there was a difference in the service granted to A&P, as compared to that provided to its injured competitors and that the alleged greater service performed for the competitors amounted to indirect price concessions. It then infers that when these indirect price concessions are substracted from the prices paid by competitors that the prices it received were not discriminatory. Differences in service, if they exist, are more properly considered under the question of cost justification rather than under the question of prices paid. Therefore, this question will be more fully dealt with below. It should be noted here, however, that the service differences between A&P and its competitors were often minimal, if they existed at all (App. 1034) and, further, that shortly after the beginning of the Borden-A&P contract, Borden

offered the same service terms to A&P's competitors, but only at a 2% discount (with very high volume requirements not exacted from A&P) as compared to the very substantial price break given to A&P (App. 1420, 3571-73, 3580, 3445-72; see also App. 946-47, 979). The citations to Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 949 (D. Conn. 1966), and the Commission's decision in United Fruit Co., 82 F.T.C. 53, 132-133 (1973), rev'd on other grounds sub nom., Harbor Banana Distributors, Inc. v. FTC, 499 F.2d 395 (5th Cir. 1974), are simply irrelevant.[14/]

C. Substantial evidence supports the Commission's finding of competitive injury

The Commission observed (App. 1035) a recognition on the part of courts that the retail food industry is highly competitive, with low profit margins. See Kroger Co. v. FTC, supra, 438 F.2d at 1379; Fred Meyer, Inc. v. FTC, 359 F.2d 351, 367 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341 (1968). Further, A&P admits that "fluid milk is one of the most important commodities carried in retail grocery stores . . . It is a perishable high volume, fast turn-over item sold by most food retailers . . . [and is] a staple . . . purchased more frequently than other [grocery]

14/ At pp. 21, 22 of its brief, A&P implies that Borden offered the same or better price-service package to its competitors contemporaneously with the beginning of the Borden-A&P contract, and later. This is simply not so. The testimony of Borden officials is clear and uncontradicted that Borden did not offer the A&P price to any other customer or prospective customer in 1965 and 1966 (App. 1407-10, 1413, 1434-35). Two offers made some years after the beginning of the Borden-A&P contract to Kroger and Jewel, chain store organizations in the area, while providing lower prices than those available to independent retail grocers, are not comparable in terms and prices to the A&P contract and cannot be accurately compared (see App. 3445-72 and App. 6032-64). Other chain store offers of record are definitely not as good as the A&P deal (App. 4461, 6065). In any event, all of these chain store offers are irrelevant to the issues here under consideration.

products" (App. 109). The admission is confirmed by the testimony of non-favored competitors of A&P (App. 1441, 1368, 1493-94, 1578, 1113, 1095-96). Because consumers are familiar with the retail price of fluid milk products, competing retail grocers price milk competitively (App. 110, 1441-44, 1831, 1835, 1368-70, 1493-1501, 1578, 1116-18, 1095-96, 1344-46). Accordingly, selling milk at prices higher than those charged by one's competitors would cause customers to shop at competing stores and would hurt one's business (App. 1442-46, 1370, 1490-94, 1579-80, 1118, 1095-96).

An unlawful discrimination is established when there is a reasonable possibility that it may have the effect of harming competition. FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948); Corn Products Co. v. FTC, 324 U.S. 726, 742 (1945); Purolator Products, Inc. v. FTC, 352 F.2d 874, 881 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968). "The competitive effects clause of the statute * * * does not require showing that injury has actually occurred, but merely that the effect of the discrimination 'may be substantially to lessen competition' (15 U.S.C. § 13(a))." National Dairy Products Corp. v. FTC, 395 F.2d 517, 521 (7th Cir.), cert. denied, 393 U.S. 977 (1968).

Competitive injury has been found where the discount was as low as 5%. FTC v. Morton Salt Co., supra, 334 U.S. at 41; Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 675 (5th Cir.), cert. denied, 382 U.S. 959 (1965). The discriminations experienced by A&P's unfavored competitors as a result of A&P's private label agreement with Borden easily satisfy these guidelines. As set forth above, supra, p. 22, price discriminations suffered by A&P's competitors ranged as high as 22.5%.

A&P's reliance upon Frank G. Shattuck Co., 65 F.T.C. 315, 359-60 (1964), as requiring Commission counsel to show more consistent profit margins for unfavored customers in order to show competitive injury to Indiana competitors is simply inapposite. The Commission based its decision in the Shattuck case on a number of facts which can be easily distinguished from this case. In the Shattuck case the competing retailers were engaged in different types of retail business, the evidence revealed the net profits of only two retail competitors whose profits were somewhat divergent (2% and 15%), and there was little evidence upon which to project the probable effects of the discrimination (the maximum extent of which against these two customers being only $84.06 annually for the first customer and $7.00 for the second). These circumstances bear absolutely no similarity to the facts of the present case, as is illustrated by the discussion of the injury evidence, supra, pp. 21-23. Nor, is there any such divergence of profit margins in this case, where all of the retail grocery competitors were found to have very low profit margins, ranging from less than 1% to 5% (App. 1036, n. 15).

Finally, complaint counsel's proof of competitive injury was not compromised by some allegedly adverse statements of certain individual competitors, nor by a decline in A&P's market shares (Pet. Br. 71). First, the Commission has ruled such statements are "neither controlling nor particularly relevant." Beatrice Foods Co., supra, 76 F.T.C. at 802, n. 21. Indeed the Commission in Beatrice observed that:

> [t]he Robinson-Patman Act protects competition not competitors. Actual injury need not be shown; nor is it significant that competitors actually prospered [emphasis supplied] (id.).

The injury evidence in this case is quite convincing and in great part is admitted by A&P, _supra_, pp. 21-23, 30-31. There is nothing in the testimony of the injured competitors which detracts from that evidence (see App. 941-42, 1023, 1035-36).

D. Substantial evidence supports the Commission's finding that A&P knew or should have known that it was the beneficiary of a price discrimination having the requisite harmful competitive effects

A&P has admitted that the retail grocery business is highly competitive and is characterized by low profit margins (App. 110). It is further admitted that milk is one of the most important commodities in the grocery business and has a higher turn-over than other grocery products (_id._ at 3). Consumers were so conscious of fluid milk prices that they would discontinue buying from a grocer charging higher milk prices than a competitor (App. 1442-44, 1370, 1490-94, 1579-80, 1118, 1095-96). Further, as a matter of trade experience A&P's knowledge of milk prices through its purchases from dairies other than Borden (App. 4021-74) and its knowledge that it purchased Borden label milk priced at a considerably higher price than it paid for private label must have signaled the marked competitive advantage it was receiving, and accordingly, the injury its competitors were suffering.

Consequently, the Commission properly concluded (App. 1037) that A&P knew or should have known that it was in receipt of a price discrimination having harmful competitive effects.

E. Substantial evidence supports the Commission's finding that A&P knew or should have known that the price discrimination it received could not be justified on either a "meeting competition" or "cost" basis

There is substantial evidence of record to support the Commission's findings, and the underlying findings of the Law Judge which were adopted by the Commission, to the effect that A&P knew or should have known that the price discriminations in its favor could not be justified on either a "meeting competition," or a "cost" basis (App. 1037-50, 1023, 943-49). For the purpose of brevity and to avoid repetition in this brief, the evidence in support of this knowledge will be discussed below in connection with the discussion of A&P's failure to prove these defenses affirmatively, after complaint counsel had established a *prima facie* case showing that A&P knew or should have known that the defenses did not exist. Suffice it to note at this point that the Commission and the Administrative Law Judge both found that complaint counsel introduced more evidence on this point than was required to establish their *prima facie* case (App. 1046, 963).

II. Substantial evidence supports the Commission's finding that A&P failed to bring its conduct within available statutory defenses

A. Substantial evidence supports the Commission's finding that the discriminatory prices induced and received by A&P were not induced in good faith to meet an equally low price

The Commission properly found (App. 1038) that a meeting competition defense was unavailable to A&P. A direct comparison of the Borden and Bowman bids reveals that the Borden private label price, rather than meeting Bowman's offer, was substantially lower. A comparison of Borden prices (App. 3494-98) with those of Bowman (App. 3385-3406) demonstrates this fact. And A&P's own contemporaneous comparison discloses Borden's price to be well below the Bowman bid (App. 3479-80).

A seller escapes liability under Section 2(a) if the discriminatory price he offers is "made in good faith to meet an equally low price of [the seller's] competitor." 15 U.S.C. § 13(b). The defense is available to the buyer if the lower prices he induces are either within the meeting competition defense or not known by him not to be within that defense. Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953). "[T]he most fundamental element of the defense is that the price met must be that of [the seller's] competition." Hampton v. Graff Vending Co., 478 F.2d 527, 534 (5th Cir.), cert. denied, 414 U.S. 859 (1973). And for A&P to qualify for the defense, the record must demonstrate, the existence of facts which would lead a reasonable and prudent person

to believe that the granting of a lower price would in fact meet, but not beat, a competitive offer. FTC v. Staley Co., 324 U.S. 746, 759-60 (1945); Hampton v. Graff Vending Co., supra, 478 F.2d at 534. Glowacki v. Borden, supra, 420 F. Supp. at 357. Consequently, if A&P knew that Borden's final offer was lower than Bowman's bid, it will have failed to bring its conduct within the ambit of Section 2(b), 15 U.S.C. § 13(b).

The record leaves no doubt that A&P knew, at the time it was considering the two bids, that Borden's offer was $82,664 lower than Bowman's competing bid. A&P's Chicago Unit Buyer, Mr. Schmidt, reviewed both offers in detail, compared the cost savings under each, and concluded that Borden's was the better offer (App. 1918, 1857-60, 3479-80, 3482). Similarly, A&P's Western Division Purchaing Manager, Mr. Bartels, also compared the two bids and recommended acceptance of the Borden bid as the more favorable price (App. 1160-61, 4295). Finally, A&P's New York Headquarters Dairy Buyer, Mr. Smith, also made a comparison of the two offers and recommended acceptance of Borden's bid because of its "considerably more attractive" price (App. 2017-18).

Accordingly, because of A&P's complete awareness of the substantial disparity between the two bids, the Commission properly concluded (App. 1038) that the "meeting competition" defense, 15 U.S.C. § 13(b), was unavailable to A&P.

Arguing that it is contrary to the public interest to prevent it from accepting a competitive offer simply because it is the lower of two bids (Pet. Br. 26-28), A&P suggests that the Commission is inconsistent in finding no duty on the part of A&P to disclose the content of Bowman's bid to Borden under Count I while apparently imposing such a requirement upon A&P for purposes of Count II. The argument is not persuasive. Under Count I, it was charged that A&P's failure to inform Borden that the meeting competition defense was unavailable was, in and of itself, a separate violation of Section 5 of the Federal Trade Commission Act, in that such practice violated the policy of Section 2 of the amended Clayton Act. The Commission rejected this charge and found that Section 5 created no such duty on A&P's part. This does not excuse, however, the knowing inducement or receipt by A&P of an unlawful price discrimination, acts which are specifically prohibited by Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f). There is nothing inconsistent between the Commission's view that a buyer is not required to disclose to any supplier the fact that a meeting competition defense is not available for purposes of Section 5, while finding that A&P unlawfully induced or received price discriminations under Section 2(f).

A&P further claims (Pet. Br. 28-33) that it is entitled to the benefit of what it characterizes as Borden's meeting competition defense. The argument is without merit. In the first place it is by no means clear, as A&P assumes, that Borden would have had a meeting competition defense had the Commission charged it with having granted an unlawful price discrimination under Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a). To refrain from

suing Borden under Section 2(a) was entirely within the prerogative of the Commission in determining the allocation of its resources. FTC v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967); Moog Industries, Inc. v. FTC, 355 U.S. 411, 413 (1958). Indeed, the Commission observed that Borden would probably not have had such a defense (Op. 20 n. 19). But even if Borden did have a meeting competition defense, that fact alone would not automatically exonerate A&P from liability under Section 2(f). "In order for the buyer to be sheltered through exoneration of the seller under * * * [a meeting competition defense] the prices induced must come within * * * [that defense] not only from the seller's point of view but also from that of the buyer." Kroger Co. v. FTC, 438 F.2d 1372, 1377 (6th Cir.), cert. denied, 404 U.S. 871 (1971). Moreover, A&P's reliance (Pet. Br. 30-31) upon the rule of Mid-South Distributors v. FTC, 287 F.2d 512, 517 (5th Cir.), cert. denied, 368 U.S. 838 (1961), which requires a showing of knowledge on the part of the buyer that the seller could not justify a price differential under either the cost justification or meeting competition defenses, is misplaced. The rule contemplates a knowing seller, and not one like Borden who was led to believe it was meeting a competitive offer. It must be remembered that the only one who was able to compare the two offers was A&P. Moreover, to find that Borden was relying upon the meeting competition defense as A&P argues (Pet. Br. 31) cannot be successfully interpreted as a finding that Borden would have actually have been successful in establishing such a defense.

A&P's assertion (Pet. Br. 32) that Borden's offer was responsive to a lower bid of Bowman's is misleading. A&P never informed Borden of the amount of Bowman's bid. Instead, Borden's offer was responsive to the threat that it would lose A&P's business

if it did not sufficiently lower its own bid to the satisfaction of A&P.

In fact, A&P's entire conduct during the last month of negotiations reveals that it misled Borden into believing the final offer was merely meeting competition, whereas in fact it was substantially beating the competitive offer of Bowman. Early in September 1965 the Borden representatives (Messrs. Minkler and Tarr) returned to the A&P representative (Mr. Schmidt) and doubled their prior offer from $410,000 annual savings to $820,000. They explicitly stated to A&P that the offer was being granted on a "meeting competition" basis and that in their opinion the competing offer was based upon "anyhow accounting," that is, based only on direct costs (App. 1733-34, 1791-92, 2152, 2181-82, 4082-85). Mr. Schmidt told them that the offer was "in the ball park" with competitive offers and told them to spread the offer over the product line. At this point it was simply an offer of annual savings and had not been calculated out on the basis of the price of the various products involved (App. 1739-40, 2151-54).

Borden then spread the $820,000 savings over the product line, including glass gallon jugs of milk. This offer was rejected by Mr. Schmidt of A&P who told Borden to eliminate the glass gallon jugs because other bidders "did not bid on glass gallons" (App. 2157-58, 1741-43). Mr. Schmidt's statement was untrue. Bowman Dairy had offered glass gallons of milk (App. 3385-3406), but A&P simply did not want to sell private label milk in glass gallon jugs (App. 1888-91).

At about this same time Mr. Schmidt told Mr. Tarr of Borden that Borden sould "sharpen your pencil a little bit because you are not quite there." Mr. Tarr took this statement to mean that the $820,000 savings was not quite as low as the competing offers in A&P's hands. Mr. Tarr so informed Mr. Minkler and Mr. Malone (Borden's cost expert) and consequently Borden reduced its prices somewhat further -- although still in the $820,000 range (App. 2158-59, 2183-85).

Then, when Borden submitted its final offer, it specifically informed A&P that the price was based on a meeting competition basis only, and that

> We know of no other way to justify this. You have to accept it on that basis (App. 1743-44, 2160, 2194).

Mr. Schmidt affirmatively replied to Borden's representatives that he understood this and that the offer was being accepted on that basis. He stated that A&P would keep the competitive offers (App. 1743-44, 2160, 2194).

There can be no doubt from this evidence that Borden was misled into believing it was, at most, meeting a competitive offer, when in fact it was substantially beating the only competitive offer, that of Bowman. 15/

15/ A&P mis-cites to the Commission Opinion to urge that there was no material misrepresentation made by it to Borden (Pet. Br. 23). In fact, the Commission found that A&P did make certain misrepresentations, but that such misrepresentations were not relevant to the charge in Count I (App. 1026, n. 5). It did not absolve A&P in connection with the Section 2(f) charge in Count II.

To the extent there is any conflict in the testimony of the Borden and A&P witnesses as to the above points, the Administrative Law Judge has made specific findings crediting the testimony of the Borden witnesses, rather than that of Mr. Schmidt (App. 950-51, 1023).

Accordingly, Kroger is directly in point. Like A&P, Kroger induced the supplier's final offer to meet a purported competing offer, and accepted the supplier's offer knowing that it beat all competing offers. The Commission and the court found that Kroger was not sheltered by the seller's meeting competition defense. In the instant proceeding, A&P pushed Borden to grant as low a price as possible, then obtained a competing bid from another dairy, and then induced Borden to make another bid on the basis of meeting competition when A&P knew the final Borden offer was substantially lower than the Bowman offer.

Finally, A&P is mistaken when it cites (Pet. Br. 32-33) Rutledge v. Electronic Hose & Rubber Co., 327 F. Supp. 1267 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975), and Harbor Banana Distributors, Inc. v. FTC, 499 F.2d 395 (5th Cir. 1974), as implicitly discrediting the court's holding in Kroger. Rutledge is irrelevant. The court therein found no violation because no discrimination was shown. Similarly, in Harbor Banana the court found no unlawful practices comparable to those found by the court in Kroger and by the Commission in the instant proceeding.

Another of A&P's assertions (Pet. Br. 33-36) on the question of meeting competition is that Bowman's bid was as low, or lower than the Borden offer. While A&P's final consideration of the two bids took place in 1965, A&P grounds its theory upon a subsequent adjustment of the Borden bid in 1973 to include a different product line and to offer a different butterfat level than that offered in 1965. The argument obviously lacks merit. It

was its original comparisons upon which A&P relied in accepting the Borden offer, and not any subsequently-determined adjustments. Borden's bid (App. 3494-98) was in fact substantially better than the Bowman bid (App. 3385-3406) as measured by the only criterion determined by A&P to be important, that of price. Accordingly, the 1973 comparison relied upon so strongly by A&P is irrelevant, because it considers factors which themselves were irrelevant to A&P's decision in 1965 to accept Borden's bid. When A&P compared the two bids in 1965, it did so on the basis of its total cost for the eleven item private label product line. It did not consider, and was not interested in, the items which it now discusses such as butterfat content and glass gallon jugs. 16/ Further, A&P's comparison is incompetent, because it is based upon speculation as to what Bowman and Borden might have offered under circumstances

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16/ As noted above, A&P specifically rejected an offer for private label glass gallon jugs, because it did not want to handle this item. A&P's attempted adjustment of Borden's butterfat level also flies in the face of evidence. The company records reveal that the butterfat level in the Bowman offer was not 3.5%, but was actually lower than that of the Borden milk (App. 2200-01, 2208-10, 2206-07). Mr. Cannon, the Bowman representative, during his testimony, agreed with Judge Hinkes that the Bowman offer did not contain any specifications compelling Bowman to supply milk at any particular butterfat level. The 3.5% mentioned in the offer merely quoted the raw milk cost to the dairy under the Federal Milk Marketing Order and stated the effect on Bowman's offered prices should that raw cost go up or down (App. 960-61, 1023, 1038-39, 2346-50, 3387). Moreover, the record shows that A&P did not care what the butterfat level was. It only required that the milk to be supplied meet minimum legal requirements (Supp. App. 6412-14).

It is also interesting that A&P's calculations would increase the butterfat level of Borden's milk, rather than decrease that of Bowman's. This is done for the simple reason that there is no evidence of record which would allow an adjustment of the Bowman prices. Similarly, there is no evidence of record that Borden would have raised its price if faced with a competitive bid on a higher butterfat milk (App. 960-61, 1023). The fact remains that A&P had only two bids in its hands and that the Borden offer granted its substantially more in annual savings.

other than those existing in 1965. At that time it did not have a Borden bid which offered a 3.5% butterfat level. Instead A&P made its judgment on the basis of one critical fact, that Borden's offer was better than Bowman's final prices by $82,600.

Moreover, the Commission in addition to finding that the Borden bid was substantially better than the Bowman bid on the basis of the quoted prices, found also that the Bowman bid was subject to certain adjustments due to A&P's true volume and delivery requirements; which requirements had not been considered in the Bowman offer (App. 1039). The Commission found that Bowman would not have been able to give A&P the lowest prices available under its offer because A&P's volume was less than the $1 million per month stipulated in that offer (App. 2311, 1843, 1869, 1872, 1877, 3385, 3219-26, 3240-41, 3402, 3508-10; see also App. 948-49),[17/] and because Bowman would have to increase the number of days delivery in the Gary-Hammond area (App. 1436, 1092, 3396, 3309, 3329, 3332, 4420, 4443). These adjustments would have expanded the already substantial differences between the Borden and Bowman offers (App. 1039).

17/ A&P's assertion that Mr. Cannon testified that the bid was not dependent upon a monthly volume of $1 million is highly misleading (Pet. Br. 36 n. 36). Mr. Cannon only testified that Bowman could have delivered in accordance with its offer if A&P's business fell "somewhat" below the $1 million figure (App. 2308). He did not say there would be no price increase if there were a substantial variance from this figure. In fact, the offer does specifically provide for such a situation and states that Bowman would charge higher prices if it were to serve a substantially smaller portion of the business (App. 2371, 3385-3402, 932, 948). Also the Bowman offer gave specific higher prices if it served less than the total number of A&P stores in this Division (App. 3402). Obviously, it would be more costly to serve 70% of the volume to 100% of the stores, than to serve 70% of the volume to 70% of the stores.

Citing the testimony of A&P's dairy buyer in New York, Mr. Herschel Smith, A&P next challenges the Commission's finding that at the time it accepted Borden's offer A&P regarded it as being substantially better than the Bowman bid. But the quoted testimony on its face states Mr. Smith's conclusion that the document (App. 4296) sent to him by Mr. Bartels demonstrates the substantial superiority of Borden's offer (App. 2017-18). Moreover, A&P's argument is grounded in the questionable premise that its own officials, Mr. Schmidt and Mr. Bartels, were guilty of making misleading statements to their respective superiors. 18/

A&P's reliance upon Sun Oil Co. v. FTC, 294 F.2d 465 (5th Cir. 1961), rev'd on other grounds, 371 U.S. 505 (1963), to show that a seller's price need not actually meet his competitor's price for purposes of the meeting competition defense is also inappropriate. The court therein found Sun's allowance to one of its dealers "about as fair and reasonable a meeting of competition as anyone could expect" in view of a market characterized by a "nervous and erratic pattern of irregular prices" resulting from a price war between one of its dealers and a vertically integrated competitor. 294 F.2d at 482. The decision is inapplicable to the present situation where A&P's knowing inducement of a price discrimination from Borden can hardly be characterized as "fair and reasonable." Similarly, A&P's reliance upon Jones v. Borden Co., 430 F.2d 569 (5th Cir. 1970), and Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966), cited (Pet. Br. 39) in support of allowing A&P "considerable flexibility" in the bargaining process, is also misplaced. Indeed, the courts in both Jones, 430 F.2d at 573, and Callaway Mills, 362 F.2d at 443,

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18/ The statements of A&P as to the "few mills" difference is also misleading, since A&P knows full well that a few mills difference per point over millions of points will amount to a substantial difference (App. 3479-80).

required one asserting the meeting competition defense to show facts which would lead a reasonable and prudent person to believe the lower prices would in fact meet the equally low price of a competitor. A&P cannot satisfy this standard under present circumstances where it knowingly induced a discriminatory price which offered savings of $820,000 as compared to the Bowman bid which gave A&P savings of $737,000 (App. 1857-60, 3481-82, 3479-80, 4295-4334). And the meeting competition defense is not available if A&P's motives were to undercut the competition. Jones v. Borden Co., supra, 430 F.2d at 573. For the same reason, Forster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965), and Kohner v. Wechsler, 1973-1 Trade Cas. ¶ 74,465 (2d Cir. 1973), also cited by A&P (Pet. Br. 40), are equally inapposite. A&P is not supported by facts "which would lead a reasonable and prudent person to believe that the [inducing] of a lower price would in fact meet the equally low price of a competitor." 355 F.2d at 56. See also 1973-1 Trade Cas. at 94,073. Nor is this a case where the discriminatory price induced by A&P from Borden merely went "beyond the technical limits of meeting an equally low price of a competitor" so as to qualify for the meeting competition defense. Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 366 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956). The Commission found that the Borden offer was substantially better than Bowman's bid (App. 1039), and the finding is amply supported by the record (App. 3385-3406, 3494-98, 4296).

Accordingly, the Commission was correct in finding that A&P was not entitled to invoke a meeting competition defense.

B. Substantial evidence supports the Commission's finding that A&P knew or should have known that the discriminatory prices induced were not cost justified

Section 2(a) provides a defense for discriminatory pricing "which make[s] only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are * * * sold and delivered." 15 U.S.C. § 13(a). In the case of a buyer, there is no liability under Section 2(f) "if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953). However, "knowledge of probable illegality is equivalent to 'culpability.'" Fred Meyer, Inc. v. FTC, 359 F.2d 351, 366 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341 (1968).

The Commission and the courts have recognized that in order to establish a prima facie case on the issue of the buyer's knowledge of illegality, Commission counsel must show either "* * * that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitors," Automatic Canteen Co. v. FTC, 346 U.S. 61, 80 (1953), or, where such methods or quantities differ,

> "* * * such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him * * *." Suburban Propane Gas Corp., Docket No. 8672, 71 F.T.C. 1695, 1699 n. 2 (1967). See also Beatrice Foods Co., supra, 76 F.T.C. at 820.

1. Complaint counsel successfully established a *prima facie* case

The record evidence herein amply supports such findings. The Commission found that although there may have been some differences between the way A&P and some of its competitors were served, the distinctions were often minimal (App. 1034, 1045). The Commission also found that many of the injured competitors bought in greater quantities than the individual A&P stores with which they competed. The evidence shows for instance, that the Tittle store in Valparaiso, Indiana, and the competing A&P store received the exact same services (App. 1564-66), as is admitted by A&P in its calculations (App. 5560), but the Tittle store purchased from 3 1/2 to 4 times the volume from Borden that was purchased by A&P (App. 3671-72, 5561-62).

Similarly, the other large Indiana competitors were described by the Assistant Route Foreman of Borden's Hammond route as receiving the same type of service as the competing A&P stores, with the exception that the injured competitors did not pre-order (App. 2114-22). Even in the case of pre-ordering he minimized the difference by noting that the driver knew from experience ("by the buildup in his book") the approximate amount that each store would need each day (App. 2122).[19/] As for the purchase bolume of these stores, they all purchased in similar volumes to that purchased by competing A&P stores (App. 3671-72). In fact, two of these

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19/ Mr. Szczepaniak, the Assistant Route Foreman, had personally served all of these stores and was familiar with the terms of service of each (App. 2109-13). His testimony is the only first-hand evidence of record concerning the comparative services all these stores received.

competitors, Burger's and Wilco, purchased in substantially greater volumes than the A&P stores with which they competed (App. 3671-72, 5784).

The record supports the Commission's finding that A&P knew or had reason to know that the price induced or received from Borden could not be cost justified (App. 1050).

First, A&P was paying Borden higher prices for its own requirements of Borden label milk (App. 3489-3510, 4019-20, 4715-4749). There was therefore no reason for A&P to believe that its competitors were paying lower prices for their Borden label requirements. A&P questions this reasoning (Pet. Br. 49-50) as insufficient to support an inference that A&P knew what its competitors were paying for Borden label products. The argument lacks substance. A&P knew of the price disparity in its own purchases of private label and Borden label milk. Further, A&P knew or should have known that the methods of service and the quantities it purchased were the same as those of its competitors. And A&P knew or should have known of Borden's published limited service at a 2% discount, as compared with the larger discount to A&P on private label products under the private label agreement. This published service-discount program was available to all stores purchasing Borden label products (App. 3571-73, 3580). Such an awareness easily supports the Commission's finding that A&P "should have known" (App. 1046) that its private label prices were not cost justified. It further placed A&P under a "duty to inquire" whether its competitors were receiving the same prices for their Borden label milk as A&P was for its private label milk. _Fred Meyer, Inc_. v. _FTC_, _supra_, 359 F.2d at 366.

Secondly, Borden's Central District President, Mr. Ralph Minkler, testified as follows concerning the conversation which took place between him and A&P's Chicago Unit Buyer, Mr. Elmer Schmidt, at the time Borden's final offer was accepted:

> * * * I said, "Elmer, there is certainly something here that I want you to very definitely understood." I said, "This price is given to you by us on the feeling and belief that we are <u>meeting a competitive bid</u>. <u>We know of no other way to justify this</u>. <u>You have to accept it on that basis</u>. You must make that clear to your superiors and to your legal people. I don't know what may come of this in the future, but I want you to understand this [:] we are going to say always that we felt we were meeting a competitive offer that you had received from someone else." And he said to me, words to the effect, "Ralph, you don't need to worry. I read you loud and clear. I understand what you are saying. My superiors and our legal department will understand it." And he says, "Just don't worry about it." (App. 1743-44; emphasis suppled.)

Consequently, A&P upon receipt of Borden's final offer had been provided with a clear warning that Borden's prices under the private label agreement could not be cost justified. A&P challenges (Pet. Br. 48-49) Mr. Minkler's statement as exaggeration or "salesman's talk," while alluding to the Supreme Court's decision in <u>Automatic Canteen</u>, 346 U.S. at 80-81 n. 24. The Supreme Court in the same footnote also recognized, however, that factual situations may occur where the seller is not entitled to rely on any assurance from the buyer, on the issue of cost justification. Further, there was no need for Borden to make a specific statement as A&P suggests (Pet. Br. 50) that a cost justification defense was unavailable. The impossibility of such a defense was clearly indicated when

Mr. Minkler told Mr. Schmidt that a meeting competition defense was the <u>only</u> way Borden could justify its private label offer (App. 1743-44).[20/]

Third, Borden failed to provide A&P with the customary written assurance that its private label prices were being made available to A&P's competitors on proportionally equal terms (App. 1894, 1897-99, 1181-82). Instead, in a complete departure from the usual explicit guarantee to A&P of proportional availability, Borden characterized its private label price only as "proper under applicable law" (App. 2010, 2032, 2042-44, 4302). By so doing, Borden again provided A&P with a clear signal that its private label prices were not being made available to A&P's competitors. A&P's suggestion (Pet. Br. 50-51) that the letter Borden sent to A&P may have been "similar or identical to others given by Borden to A&P" is irrelevant. The fact is that in the instant proceeding A&P affirmatively requested from Borden a letter stating that the prices Borden had quoted to A&P were proportionally available to A&P's competitors (App. 1894, 1897). Borden's letter to A&P, however, contained no such assurance and A&P's headquarters officials recognized that fact (App. 2031-33, 2042-44, 4460). In fact, Borden subsequently removed such "proportionally equal"

20/ This statement and others which Borden made to A&P concerning the "meeting competition" nature of its final offer and the "anyhow accounting" basis of the competing offers (App. 1893-1912, 3481-82), could not be taken as exaggeration or "salesman's talk." These Borden actions, taken to notify A&P, were very serious matters. As discussed above, Borden was faced with a "life or death" situation. It had to retain the A&P business or suffer a staggering loss on its expensive new plant. It could not afford to antagonize A&P without substantial reason (App. 1721-22). Nevertheless, Borden clearly and persistently charged A&P with the notice that its final offer could <u>only</u> be justified on a meeting competition basis.

language from its private label pricing sheets given to A&P, which maintaining such language on pricing sheets pertaining to Borden label sales to A&P (App. 2174-76, 3585-3668; Supp. App. 6419-22).

Fourth, detailed cost data supplied to A&P during the course of the negotiations revealed that under the private label contract Borden would either suffer a loss or at best realize a marginal profit (App. 1697-1701, 1147-50, 3306-23, 3328, 2412-13). In challenging the accuracy of Borden's Vice President and accountant, Mr. Malone's, calculations (Pet. Br. 51), A&P again raises an issue, which is irrelevant. As the Commission observed (App. 1047), the significance of Mr. Malone's data is that it put A&P on notice that the private label discount "could drastically affect Borden's profits" and thereby imposed upon A&P the "duty to inquire." Fred Meyer, Inc. v. FTC, supra, 359 F.2d at 366.[21/] For the same reason, A&P's questioning (Pet. Br. 51 n. 42) whether the granting of private label prices need be on proportionately equal terms for purposes of Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (Pet. Br. 51 n. 42), is also irrelevant. The fact that A&P did not receive from Borden the assurance it requested was enough to give A&P reason to know that Borden's private label prices were not cost justified.

21/ Petitioner makes a shotgun attack on the cost data supplied to A&P during the negotiations alleging, without record citation, that they did not take into account service limitations included in the A&P offers and referring to "other errors" supposedly set out in A&P's original proposed findings before the Law Judge. An examination of the cost calculations in question show that they are based on a limited service to A&P, with no return of spoiled product, just as the final offer (App. 3235, 3274). As for the "other errors" cited in A&P's findings, these have been completely discredited in complaint counsel's Reply Findings at Supp. App. 6384-86 and in the Reply Brief before the Commission at pages 37-38.

Fifth, A&P's trade experience should have given it reason to believe that Borden's private label prices could not be cost justified. "[T]rade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution." Automatic Canteen Co. v. FTC, 346 U.S. 61, 79-80 (1953). Discussions between A&P and Borden concerning milk prices reveal that A&P was well aware of market conditions both in the milk industry generally and in the Chicago area as well (App. 1697, 1709, 1723, 2133, 2164, 1954, 1843, 1845, 1849, 1159, 3208-15, 3217-18, 3276-83, 3324-27, 3331-34, 3381-83). And because A&P purchased Borden label milk at prices higher than those provided under its private label agreement with Borden (App. 3489-3510, 4019-20, 4715-49), A&P must have known from its familiarity with the market that its competitors were also paying these same higher prices for their Borden label products (see also App. 2174-76; Supp. App. 6419-26). Indeed, A&P's extensive knowledge of the trade was easily sufficient to give it reason to know that Borden's private label prices could not be cost justified.

A&P asserts (Pet. Br. 52) that its reliance upon the 2-2-2 formula as a rule of thumb gave it reason to believe that Borden's prices were cost justified. The contention lacks merit. In Finding 98 (App. 945-46), adopted by the Commission (App. 1023, 1051), the Law Judge found the formula to be "merely a reference point from which to work and had to be adjusted for different conditions

in different areas." In fact, the Law Judge noted that this 2-2-2 formula actually indicated that Borden's private label prices to A&P in Chicago had to be below Borden's cost, once adjustments were made for conditions in the Chicago area, including the very low volume purchased by A&P stores in the Chicago Division. The Commission properly found (App. 1051) that because costs and conditions in Chicago were different from other areas of the country the formula had to be adjusted and that it would be irrational for A&P to rely upon the formula.

Finally, after the private label agreement had gone into effect, A&P in May 1966 refused to accept a price increase (based on certain cost increases incurred by Borden) on its private label products while consenting to increases on its Borden label products (App. 1391-95, 3511-14, 4020). Accordingly, the Commission found an awareness on the part of A&P that Borden label products sold to A&P's competitors at comparable delivery terms were being subjected to comparable increases not accepted by A&P on items purchased under the private label agreement (App. 1049). In fact, A&P was expressly informed by Borden that these cost increases had been passed on to its competitors (App. 1388-94, 3511). A&P claims (Pet. Br. 53) that its resistance to Borden's 1966 price increases was justified on the ground that, because it was already receiving limited service on all Borden products, it should not have to bear Borden's cost increases. The argument

misses the point entirely. The fact remains that, in May 1966, Borden informed A&P that it was raising its prices to all customers to cover increased costs (App. 1388-94), and that A&P, while accepting the increases on its Borden label products, refused to accept comparable increases on its private label products (App. 1393-95, 3514). Obviously, A&P had to know that be refusing this price increase, it was, at the very least, widening the already existing discrimination in price between Borden and A&P label products. Moreover, as the Commission observed (App. 1049) A&P's acceptance of the increase on its Borden label products suggests an awareness on its part that Borden label milk sales to A&P's competitors were on the same delivery terms as those under which Borden sold Borden label and private label milk to A&P. Finally, A&P's later acceptance in 1967 of only a portion of the increase (App. 1397-1403; Supp. App. 6408-12) on its private label products gave it even more reason to know that the private label prices were not cost justified.

Under these circumstances the Commission properly found (App. 1050) that complaint counsel has established its *prima facie* case. In view of what A&P must have surmised from its own purchases of *Borden label* milk, Mr. Minkler's statement to Mr. Schmidt concerning Borden's only means of justifying the terms of its final offer, Borden's failure to provide the usual written assurance of proportional availability, Borden's own cost figures supplied to A&P, A&P's experience in the trade, and finally, A&P's conduct during the period following execution of the private label agreement, the conclusion is inescapable that A&P knew, or at the very least should have known, that the private label prices it induced from Borden were not cost justified. Additionally, these same factors conclusively rebut any attempt by A&P to show lack of such knowledge. See *Automatic Canteen Co*. v. *FTC*, *supra*, 346 U.S. at 74.

Relying upon *Automatic Canteen*, A&P claims (Pet. Br. 42-47) that the Commission was required to make a specific finding that Borden's prices to A&P under the private label agreement were not actually cost justified, in addition to the finding on the question of A&P's lack of knowledge that it had a cost justification defense. A&P's argument constitutes a misconstruction of the law. As we have already stated, *supra*, p. 46, a showing that the buyer either knew or had reason to know that the prices it induced or received could not be cost justified is sufficient for complaint counsel to establish his *prima facie* case. *Suburban Propane Gas Corp*., 71 F.T.C. 1698-99 n. 2 (1967); *Beatrice Foods Co*., *supra*, 76 F.T.C. at 820; *Fred Meyer, Inc*. v. *FTC*, *supra*, 359 F.2d at 364. In *Fred*

Meyer, the court specifically noted that "[t]he inquiry here was devoted to ascertaining this fact [i.e., the buyer's knowledge], not to whether cost justification did or did not exist in fact." 359 F.2d at 364 n. 13. Finding nevertheless that the Commission carried the burden of showing the buyer's reason to believe that the price discriminations induced by the buyer were not cost justified, the court of appeals observed:

> That the Commission did not prove the costs of the suppliers is immaterial * * * At least where the facts and inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an unsuspecting recipient of prohibited discriminations," Automatic Canteen, supra, 346 U.S. at 81, 73 S.Ct. at 1028 [Emphasis added.] 359 F.2d at 364.

Clearly, A&P has misread Automatic Canteen to extract a heavier burden of the Commission than the required showing that A&P was not an "unsuspecting recipient of prohibited discriminations" from Borden. Even in Automatic Canteen, the Supreme Court stated that where, as here, there are few if any differences in quantities purchased or services received, "[t]he Commission need only show, to establish its *prima facie* case, that the buyer knew that the methods by which he was served and the quantities in which he purchased were the same as in the case of his competitor." 346 U.S. at 80. The Law Judge found (App. 963), and the Commission adopted his finding (App. 1023), that with respect to quantities purchased and services received from Borden by A&P and its competitors, "there were no cost differences," with the possible exception of negligible advertising costs.

A&P is inaccurate when it boldly quotes (Pet. Br. 47) the Commission as finding that "there were differences in the way A&P and its competitors were served" (App. 1034) and that "many of these [competing] stores received more service than A&P" (App. 1045). The former finding reads, in its entirety, as follows: "In addition, although there were differences in the way A&P and its competitors were served, the distinctions were often minimal and, in any event, are more properly considered with the cost justification defense" (App 1034). The second finding reads: "Although many of these stores received more service than A&P, the service savings to Borden could not in any way justify the price differentials."

Finally, A&P's assertion (Pet. Br. 46-47) that the Commission made no specific finding that there actually was no cost justification is simply incorrect. The second finding quoted above, speaks for itself. Moreover, in Finding 110 (App. 950), adopted by the Commission (App. 1023), the Law Judge found:

> Considering that the unfavored customers competing with A&P purchased as much as, if not more than, the A&P store purchased from Borden, that the cost of processing A&P's private label products was no less than its cost of processing the equivalent Borden label product [Citation omitted] and that, except for advertising, no differences in service or delivery terms existed between the labels, but that advertising expense was insufficient to relate meaningfully to the differences in prices Borden charged A&P compared to competing retailers, <u>no price discrimination can be justified under the Robinson-Patman Act. There is no difference "in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which such commodities are sold or delivered."</u> Indeed, Malone's calculations demonstrate the necessary resultant differences in net income because of the unjustified price differentials. [Emphasis added.]

A&P's attempts to discredit the calculations of Borden's Vice President and cost accountant, Mr. Malone (Pet. Br. 47 n. 39) and thereby to undermine Finding 110 are without merit. The fact that the Commission did not consider Mr. Malone's calculations a cost study (App. 1048 n. 25) and that the Commission declined to pass upon their accuracy by no means suggests, as A&P mistakenly implies, that the Borden computations were unreliable.[22/] In fact, A&P's Mr. Bartels attested to the accuracy and sophistication of Borden's cost accounting (App. 1158).

A&P notes (Pet. Br. 47-48) that there was no finding that A&P knew at what prices its competitors were buying Borden milk. The assertion is irrelevant. For the reasons set forth in its opinion (App. 1045-50) which we have already discussed, supra, pp. 47-55, the Commission found that A&P knew or should have known that its prices induced from Borden under the private label agreement were not cost justified (App. 1045-46, 1050). Under the circumstances A&P "had knowledge of at least sufficient facts to create a reasonable suspicion

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22/ A&P, in its brief, also makes an unfounded attack on Mr. Malone's credentials as a cost expert (Pet. Br. 6). In a very chauvinistic manner, it implies that the lack of an accounting degree reflects upon Mr. Malone's qualifications (Pet. Br. 6). However, the record clearly reveals Mr. Malone to be a highly respected cost expert (see App. 1618-20, 1778, 1158). Moreover, it also reveals that he had considerable formal education as an accountant, with three years at Pace Institute and additional courses at Columbia University and the City College of New York. He had also served as Chairman of the Accounting Advisory Board and as a member of the accounting committee for the International Dairy Association, and had been appointed by the State of Wisconsin to a study group in connection with that State's Fair Trade Practices Act (App. 4090-92). Mr. Malone had a great deal of cost accounting experience, including detailed cost accounting studies of Borden's operations in at least two areas (Chicago and Wisconsin) and he had been qualified as an expert cost accounting witness in the matter of United States v. Borden Co., 370 U.S. 460 (1962) (App. 4094-4100). The belated attempt to belittle Mr. Malone's abilities in A&P's brief is highly uncalled for.

that the [prices] it received were probably illegal * * * [so that the] duty to inquire arises." Fred Meyer, Inc. v. FTC, supra, 351 F.2d at 366. A&P made no such inquiry in the instant proceeding.

It is further claimed (Pet. Br. 47-48) that the Commission made no finding that A&P knew in what quantities its competitors were buying or what services its competitors were receiving. Here again the argument is irrelevant. In Finding 135 (App. 964), adopted by the Commission (App. 1023), the Law Judge found that "A&P knew or should have known that the methods of service and the quantities it purchased were the same as its competitors." Because Borden's prices were set according to published price lists and discount schedules providing a discount of only two percent for limited service from the price for Borden label milk, A&P's experience in the trade, and the information it gained from discussions with Borden officials concerning pricing patterns in the Chicago area, A&P must have known that Borden's prices to A&P's competitors for Borden label milk were higher than the private label prices granted to A&P. These factors also paced A&P under a duty to inquire concerning not only Borden's prices but also the quantities and services Borden was providing to its non-favored customers. Fred Meyer, Inc. v. FTC, supra, 359 F.2d at 366.[23/]

Accordingly, complaint counsel has carried its burden in proving the prima facie case that A&P knew or should have known that the price discriminations it received could not be cost justified.

23/ The fact that some of A&P's competitors purchased in greater quantities than A&P was highly publicized, in that it was noted by the Supreme Court in its opinion in United States v. Borden Co., 370 U.S. 460, 469-470 (1962).

2. A&P was unsuccessful in its effort to rebut complaint counsel's _prima_ _facie_ case

As the Commission found, the burden was then upon A&P either to discredit this prima facie case, or to prove a _de_ _facto_ cost justification (App. 1052). It has done neither (App. 1052-57).

Before considering the cost studies which A&P presented, it should be noted that under the facts of this case, the price discriminations in favor of A&P could not possibly be cost justified under Section 2(a) of the amended Clayton Act (see App. 979-80, as adopted by the Commission at App. 1052). Only those cost differences which are due to the "differing methods or quantities" of sale or delivery are cognizable under Section 2(a) of this Act (15 U.S.C. § 13(a)). Even if it were the fact, which it is not, that there were substantial differences in the methods of delivery as between A&P and its competitors, the cost differences in this case could not be related to such "differing methods." Borden offered the same service terms to all stores in the relevant areas (compare App. 3571-73 and 3580 with App. 3460-61). However, in contrast to the great savings granted to A&P on private label, Borden offered only 2% additional discount in its published offer to competing stores. Moreover, the competing stores had to meet a 600 point per delivery requirement, which was not applicable to A&P and which A&P could not meet (App. 3571-73, 3580, 3317, 3329, 3284, 5695, 5784). Thus, the same price-service package granted to A&P was not made available to competing purchasers.

Under these circumstances, any differences in costs in this case are not due to "differing methods" of sale or delivery, but solely to the fact that the price-service package was not made available to competitors. This does not fulfill the requirements of Section 2(a) of the amended Clayton Act. As noted by the Law Judge (App. 979-80, 1052) the counter-logic of A&P "would require competitors to accept the same service program at much less discount in order to preserve their rights under the Robinson-Patman Act, even if it meant compounding their loss or disadvantage by requiring them to incur more in-store service cost as the result of reduced services from Borden, without an adequate discount to compensate them for it." He goes on to point out that the effect of A&P's position would be that:

> a [seller] may legally discriminate in price if he wraps up the price package in service terms and offers the same service to others at a much higher, unattractive price, which the competitors will not accept. The difference in service terms will then justify the price difference (App. 980, 1052).

As the Law Judge notes, "[s]uch an obvious flout of the Robinson-Patman Act cannot be tolerated. Non A&P stores were offered the same service terms enjoyed by A&P but were required to pay more. There was, however, no difference in Borden's cost savings as between the A&P stores and non-A&P stores receiving the same services. It follows, therefore, that no price differences could be justified thereby" (App. 980, 1052).

As for the cost studies of A&P, the record amply supports the finding that these studies, introduced by A&P in an attempt to portray Borden's costs of serving A&P to be lower than they actually were, were so defective and inadequate as to prevent their providing any evidentiary basis to justify the discrimination between Borden's private label prices to A&P and those charged for Borden label products to A&P's competitors. In the first place A&P's cost studies lacked internal consistency. Although they allocated certain cost to A&P's competitors which were allegedly incurred by Borden solely in its dealings with those competitors, they fail to allocate costs to A&P which were incurred by Borden solely in its dealings with A&P. For example, Borden's manager of chain store sales, Mr. Gorden Tarr, spent most of his time serving the A&P account, both before and after execution of the private label agreement (App. 2123, 2164-66). Another Borden sales representative also devoted the majority of his time to the A&P account after the beginning of the private label contract (App. 2165-66). A&P witness, Mr. Havemeyer, the management consultant who constructed the A&P study, admitted that he did not evaluate or include these expenditures as part of Borden's cost of serving A&P (App. 2643, 3076-86). And yet under proper accounting procedures he was required to do so (App. 1531-32). 24/ Further, while a disproportionate amount of time was devoted to the A&P account by Borden executives, Messrs. Minkler, Malone, Gose (App. 5664, item 1; 1622-1776, 1386-1404, 4103-4273) as well as by certain members of Borden's New York office (App. 1075-80),

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24/ As noted by Mr. Rowe in Price Discrimination Under the Robinson-Patman Act (1962) at p. 287: "It would be hard to defend a cost study which lacked internal consistency by resort to analytic reasoning with respect to one factor that would vitiate another."

Mr. Havemeyer also admitted not having made a study of these additional expenses (App. 2643-44, 3076-86), even though without the inclusion of such a study, Mr. Havemeyer's findings would prove unreliable (App. 1532, 3076-86). Other additional expenses incurred for A&P, but not its competitors, and which were not covered by the study, included extra loading and clerical services (App. 976-77, 1052).

Additionally, Mr. Havemeyer was frequently unable to produce substantiation for his opinion when called upon by Commission counsel on cross examination to do so. Instead, he offered numerous disclaimers reflecting a total lack of familiarity with the basic information needed to substantiate his conclusions (App. 2514, 2583, 2605, 2639, 2642, 2646-2651, 2733-34, 2797). For example, in one of A&P's studies, leakers and products spoiling within date, which were returnable by A&P, were treated as "product waste" and thus some expense was allocated to A&P under this expense category (App. 2648, 5565-5681). In the other two studies, however, Mr. Havemeyer claimed that such items were not included in "product waste," but were accounted for in some other manner in Borden's bookkeeping system (App. 2796). He was unable, however, to cite to any record evidence for this change in opinion, or to any person from whom this information was obtained (App. 971, 1052).

Perhaps, the most telling evidence of the basic deficiencies in Mr. Havemeyer's cost justification methodologies is found in his study of the Tittle and A&P stores in Valparaiso (App. 5560-62). In this study, Mr. Havemeyer used certain exhibits (App. 5097 and 5101) as the basic source for his cost data on the assumption that Mr. Marquardt (the independent distributor who delivered to these

two stores for Borden) picked up his milk at the Hammond dock. He was unable to substantiate his position (App. 2835). Marquardt himself never testified as to where he picked up the milk (App. 1516-77), but other record evidence associates Valparaiso with Borden's South Bend branch, not Hammond (App. 3249, 3453). Thus, he apparently used the wrong records to support this study.

But, even if he had the right records they would have shown Borden's expenses of dealing with the independent distributor, not with these two stores which were only served by the distributor. (The distributor purchased milk on his own account and resold it to his own customers, except for that volume which he delivered for Borden on a commission basis (App. 1569)).

Further the cost justification in this particular instance (Valparaiso) was based almost solely on branch selling expense (the expense related to the activities of Borden's salesmen) and credit and collection (App. 5560). However, the record shows that the Borden salesmen did not call on the Tittle Valparaiso store (App. 1595-96), while it does not show that Borden salesmen did not call on the individual A&P stores (App. 3461). Moreover, the branch selling expense was comprised in substantial part of an item entitled "Provision for Bad Loans" (App. 5100, line 11, 5097, 5101, 5560-62). Mr Havemeyer admitted this item dealt with loans from Borden to a particular customer or customers (App. 2926-27). Yet, the record shows that Tittle had not received a loan from Borden (App. 1598-99). Moreover, that part of this expense which was transferred to App. 5101, the cost record used in the Valparaiso

study, would necessarily be a cost of doing business with the distributor which was the subject of this cost record, not the Tittle Valparaiso store which was not even a customer of the independent distributor, as noted above.

As for the credit and collection expense, it was admitted that the Borden record from which this was derived was a "bad account" expense record (App. 2945-47, 5857); for example, there are substantial amounts due to "legal expense" and "interest overdue accounts" (App. 5857). Yet, Mr. Havemeyer's own exhibit shows that the Tittle Valparaiso store (as well as the other injured Indiana competitors included in complaint counsel's proof) was not a bad account, in that it regularly paid its bills within a 4-week credit period (App. 5563-64; see also App. 1579).

As noted in the Law Judge's findings, these errors exemplify similar errors in all of Mr. Havemeyer's studies, especially those dealing with the other disfavored Indiana competitors (App. 972-74, 977-79, 968, 970-972; adopted by the Commission at App. 1052).

Finally, Mr. Havemeyer had no familiarity with Borden's operations (App. 2406-07, 2583). This obviously led to the many errors cited above and in the opinions of the Commission and the Law Judge. Indeed, the sum total of his experience with Robinson-Patman Act cost studies was limited to one other case, United States v. Borden Co., 370 U.S. 460 (1962), in which his study was rejected by the Supreme Court as unsatisfactory (id. at 470-71).

Despite such obvious deficiencies A&P challenges as improper (Pet. Br. 54-64) the Commission's rejection (App. 1052-1057) of A&P's cost studies. A&P first claims (Pet. Br. 55) that the Commission is required to follow a "liberal attitude" and accept a buyer's cost study when the study is prepared "in accordance with sound accounting principles." Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 394 (1948). A&P's argument is its own refutation. The rule by no means requires Commission acceptance of cost studies which fail to comply with sound accounting principles. Indeed, both the Commission (App. 1052) and the Law Judge (App. 981) found that A&P's cost study, instead of being prepared in accordance with accepted principles of accounting, was "so defective and inadequate as to furnish no evidentiary basis to justify the price differential that A&P received for private label products on the basis of Borden's cost savings" (App. 1052).[25/] In fact, the Commission found A&P's cost studies so flawed as to be unpersuasive under "any reasonable standard" (id.). Accordingly, the Commission's rejection of A&P's cost studies falls well within the doctrine of Minneapolis-Honeywell Regulator Co. and adopted by

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25/ For further example, Mr. Havemeyer did not follow even his own published advice in preparing a cost study which would require that in reporting costs "a [time] period of sufficient length should be selected to cover cyclical and seasonal fluctuations but yet represent current methods. The month in which the price action occurred that triggered the complaint or investigation must be included" (Wisconsin dairy manual prepared by Mr. Havemeyer -- App. 3040-41). The record shows that Mr. Havemeyer generally based his computations on Borden records for only a single month (App. 5565-5873).

this Court in FTC v. Standard Motor Products, 371 F.2d 613, 622 (2d Cir. 1967). Accordingly, A&P's reliance upon the foregoing authorities is misplaced.

It is further asserted (Pet. Br. 56) that much of A&P's difficulty in securing information from Borden was due to the Commission's "unjustified delay" both in the completion of its investigation and in the issuance of its complaint in October 1971, some five years after commencement of the investigation. The argument is without merit. There has been no showing that there was any undue delay, nor that A&P was materially impeded in the preparation and presentation of its defense. In fact, the length of the record, some 21,000 pages, is clear evidence that this was a highly complex proceeding in which there was no undue delay at the investigative stage. It took from June 11, 1973, until March 1975 to complete this record. Accordingly, the Commission was entirely justified in finding (App. 1063) that, considering the complexity of this case as it was presented and argued by complaint counsel and A&P, "the time taken to conduct the investigation was not excessive." Moreover, in order to be prejudicial, delay, if any, must have resulted in actual prejudice to A&P. FTC v. J. Weingarten, Inc., 336 F.2d 687, 691-92 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965). A&P has made no such showing in the instant proceeding.26/

26/ Moreover, the record does not show that Borden cost records were unavailable to A&P. On the contrary, the record shows that Borden cooperated with A&P in providing all desired documentation. The record also shows, however, that someone other than Mr. Havemeyer selected only a portion of the available cost records, without any review by Mr. Havemeyer (App. 2406-07, 2583) and that the records utilized by Mr. Havemeyer were incomplete.

A&P further states (Pet. Br. 57-60) that the Commission erred in its rejection of A&P's original computation of delivery expense because of its being premised upon time standards no longer available. A&P's contention is without substance. The Commission observed (App. 1053) that these conclusions, based upon time standards developed in 1949 from studies of Bowman Dairy (not Borden) deliveries, were summary in nature and that the destruction of their underlying data precluded a judgment as to their reliability.[27/] For these reasons it properly affirmed (App. 1054) the Law Judge's refusal to admit A&P's summary conclusions into evidence (App. 114-117). The Commission also adopted (App. 1023) the Law Judge's finding (App. 966) that no meaningful comparison could be made between these figures and those of Borden's Vice President and accountant, Mr. Malone. Moreover, because A&P's witness, Mr. Robert Havemeyer, participated neither in the collection of the underlying data nor in the preparation of the standards based thereon (id. at 2), this Court's decision in Buchwalter v. FTC, 235 F.2d 344, 346 (2d Cir. 1956), is readily distinguishable (Pet. Br. 58). In no sense was Mr. Havemeyer a person "supervising and participating" in the collection of the

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27/ As the Commission noted, when Mr. Havemeyer was asked certain basic questions concerning the Bowman time study summaries, he stated, "I cannot tell you because the working papers * * * are no longer available" (App. 3037-38).

data and formulation of the standards from which he prepared his own conclusions concerning Borden's delivery costs. Additionally, A&P's reliance (Pet. Br. 53) upon Williams v. Humble Oil & Refining Co., 53 F.R.D. 694 (E.D. La. 1971), is misplaced. Unlike Mr. Havemeyer's summary conclusions, the documents involved in Williams were made in the regular course of business and not "in preparation for litigation." 53 F.R.D. at 700.

A&P further challenges (Pet. Br. 58-60) the Commission's approval (App. 1054) of the Law Judge's rejection (App. 966-67) of Mr. Havemeyer's alternate use of time standards taken from a publication (App. 4472-82) of the Wisconsin Department of Agriculture ("Wisconsin Manual"). Admitted into evidence only for the limited purpose of impeachment of complaint counsel's witness, Dr. Solverson (Order, dated November 22, 1974), the Wisconsin Manual is of no use to A&P in its effort to determine amounts of time required to serve Borden customers in Chicago and Hammond. Indeed, the Wisconsin Manual itself shows that there were material differences in service terms between the Wisconsin and Chicago markets. For example, while the time consuming process of stamping merchandise was performed in Wisconsin as part of a full service delivery program (App. 4474), a delivering dairy under a full service contract performed no comparable function for its customers in the Chicago area (App. 3103-06, 4492-95). Moreover, as the Law Judge noted, the Wisconsin Manual time standards were shown not to be precisely applicable to the State of Wisconsin, let alone to Borden's delivery practices in an entirely different market area (App. 2091-92, 2094-05). This is even better

illustrated by the fact that Mr. Havemeyer's own studies in still another market area, New Jersey, revealed that there were very substantial differences in time allocations as between different market areas (App. 2684-88). Accordingly, the Law Judge's rejection of the Wisconsin Manual on the issue of Chicago and Hammond delivery costs was entirely proper. Nor was it inconsistent, as A&P's mistakenly suggests (Pet. Br. 58-59), with the Commission's representation to the Supreme Court in Automatic Canteen, supra, 346 U.S. at 69, where the Commission raised the possibility that published trade data could be used to show a seller's costs. The Commission's assertion in Automatic Canteen assumed the relevance and comparability of the published data to the particular market in question, factors not present in the instant matter.

A&P suggests (Pet. Br. 59) that the appropriateness of the Wisconsin Manual time standards is borne out by the fact that, when it is compared with Mr. Havemeyer's calculations based on his initial time study conclusions and a 1964 Haskins & Sells study of Borden's Milwaukee operations, all result in substantially the same figures for Borden limited service delivery to A&P and all are lower than those of complaint counsel. The argument is misleading. No matter which set of standards is applied to determine Borden's delivery costs in Chicago and Hammond, A&P in its brief is including such standards in the same Havemeyer cost calculations and will necessarily have similar results. Those calculations are defective in many other respects as found by the Law Judge (App. 968-69, 974-75) and adopted by the Commission (App. 1023). If, for example, Mr. Havemeyer had allocated each expense in the manner

incurred, there undoubtedly would have been substantially different results.

A&P's reliance (Pet. Br. 55, 60) upon this Court's decision in Reid v. Harper & Brothers, 235 F.2d 420 (2d Cir. 1956), to support the validity of its cost studies is misplaced. In Reid, the Court affirmed the lower court's submitting this question to the trier of fact while observing that under the circumstances in that case the use of a 1951 publication to compute costs for an earlier period appeared to be the best available procedure. Here as in Reid both the Law Judge and the Commission, as fact finders, have carefully evaluated A&P's studies of Borden's delivery costs and have found them unreliable.

A&P next challenges (Pet. Br. 61-62) the Commission's finding (App. 1055) that A&P's cost studies were defective for not allocating overhead expenses according to accepted accounting principles, and defends Mr. Havemeyer's practice of allocating central office expenses on the basis of the percentage of branch expenses attributable to A&P and its competitors. Yet A&P refuses to accept the fact that these expenses relate to far more than certain branch functions and must be allocated among all segments of the business to which they apply with any residual expenses being allocated to all business activities of the home office. 37 Fed. Reg. No. 241, Part II, pp. 26680-86. Further, the reference to the testimony of the Commission accountant, Mr. Lemberg, is simply incorrect. Mr. Lemberg did not state without qualification that the procedure followed by Mr. Havemeyer is generally accepted and almost universally followed. Mr. Lemberg testified instead that the allocation of central office,

overhead expenses on the basis of a percentage of costs previously allocated

> * * * is the usual way to do it but I have to qualify that again only those that cannot be directly charged--if you had some that must be directly charged then they have to be removed (App. 1560).

A&P next questions the finding (App. 1054-55) that A&P's cost studies failed to reflect Borden's incurring certain costs only in relation to its dealings with A&P by referencing Mr. Havemeyer's allocation of central office expenses among A&P and other Borden customers. The argument is misleading. The Law Judge (App. 976), and the Commission (App. 1023, 1054-55) found that while certain officials in Borden's Chicago and New York offices spent a large amount of their time on the A&P private label account (App. 1622-1776, 2123-24, 2125-63, 2164-66, 1386-1404, 4103-4273, 1075-80), Mr. Havemeyer performed no special study of these expenses (App. 2643-44, 3076-87; Supp. App. 6451-52). Mr. Lemberg testified that if there were any indication of extra expenses for servicing to the A&P account, they should have been studied (App. 1531-32). A&P's statement (Pet. Br. 6162) that Mr. Lemberg acknowledged the allocation of Mr. Tarr's salary to A&P is misleading insofar as it implies that Mr. Havemeyer's allocation of this expense was proper. Instead Mr. Lemberg stated that "that portion attributable to A&P should have been removed and charged directly to A&P" (App. 1558). And even though he testified that a time study might not have been practicable in the instant proceeding, Mr. Lemberg added the qualifying statement that "where we have a Sales Manager or Vice President who handles certain accounts, we have no problem, we can charge it directly because we know what he does" (App. 1560). Accordingly, Mr. Havemeyer should have charged directly to the A&P

account the cost of those Borden officials devoting vast amounts of time to that account.

A&P next asserts (Pet. Br. 62) that the Commission's rejection of A&P's studies for failure to allocate costs in the manner in which they were incurred (App. 1055) is arbitrary to the extent that it adopts complaint counsel's contention that transportation expenses should be allocated on a volume basis. A&P again references the Commission accountant, Mr. Lemberg, as admitting in his testimony that certain transportation expenses have no relation to the volume transported. A&P again misconstrues Mr. Lemberg's testimony. Mr. Lemberg made no such admission. To the contrary, although he did state that insurance, licenses, and taxes would not be affected by volume (App. 1541), he further testified that items such as vehicle cost are best allocated on a per unit or volume basis because, on that basis, the cost is apportioned according to the amount of benefit to each customer (App. 1537, 1541). He further stated that there would be "[v]ery little basis" for allocating these costs on the basis of time spent at a particular store (App. 1541). Mr. Lemberg specifically cautioned that the "many [hypothetical] situations" (Pet. Br. 62) in which it would be permissible to allocate truck expenses on a time basis were not present in the instant proceeding (App. 1543, 1545). Similarly, Mr. Lemberg did not agree, as A&P mistakenly asserts (Pet. Br. 63), that drivers' commissions should be allocated on a time basis. To the contrary when asked whether commissions "are frequently allocated by cost accountants on a time basis," Mr. Lemberg replied, "It would be. Circumstances might

permit that in some cases" (App. 1533). Mr. Lemberg then stated, however, as a controlling principle that a cost should be allocated in the manner in which it occurs in relation to customer benefit and affirmed his position that driver commissions should be allocated according to delivery volume where, as here, that is the manner in which they were incurred (Supp. App. 6395).

A&P also confuses (Pet. Br. 63) the Commission's finding (App. 1055) that A&P's cost study inaccurately assigned costs to certain customers. The Law Judge's finding (App. 978-79), adopted by the Commission (App. 1023), was that Mr. Havemeyer had allocated only 12% of Borden's credit loss expense to retail home delivery customers while assigning 88% of this expense to wholesale customers (App. 2941). Yet he admitted that if done on a volume basis retail sales would account for 25% of this expense (App. 1923). Indeed Mr. Havemeyer further admitted (App. 2945-47) that this was a "bad account" expense record with substantial amounts attributable to "legal expense" and "interest overdue accounts." The Law Judge's finding (App. 978), adopted by the Commission (App. 1023), was that the account was basically related to customers in arrears. With only one exception, however, all of the independent wholesale accounts had actually been extended only the normal four-weeks credit (App. 5563-64). Accordingly it was entirely proper to find that there was no reason to allocate a credit loss expense among other customers (which were also unfavored competitors of A&P) when A&P (who was also a credit customer) was not so charged and when many of those customers

were as financially sound as A&P (App. 6118-6304, 6310-78, in camera; App. 4003-4014).

A&P claims (Pet. Br. 63-64) that "in considering these cost studies" it showed an "over-justification" of Borden's prices to A&P in Illinois. A&P concludes therefore that Borden's prices to A&P would be cost justified even if delivery cost differences derived by A&P (and which were excluded because of lack of underlying records supporting Mr. Havemeyer's time calculations) overstate the differences in cost between A&P and other customers by 100%. The argument is without substance. Because the Commission has found A&P's studies defective and unreliable (App. 1052-57) they should not be considered for any purposes. Further, an examination of A&P's cost study (RX 233) reveals that this is a mis-statement, since when the delivery cost calculation for unfavored competitors is eliminated, Borden's private label prices to A&P will not be cost justified (App. 5728-37, 5740-42, 5744-50, 5752-53).

For all of these reasons, therefore, A&P's arguments are defective and it was entirely proper for the Commission to reject A&P's cost studies as unreliable. Because A&P was unable successfully to rebut Commission counsel's prima facie case, the Commission properly found Borden's discriminatory prices to A&P under the private label agreement not to have been cost justified.

III. The sanctions imposed by the Commission's order are warranted by the proven violations and the Commission properly exercised its discretion in its choice of remedy

A&P challenges the Commission's order as being unnecessary and, in any event, unduly broad (Pet. Br. 78-84). The argument lacks substance. The sanctions imposed by the Commission's order are authorized by the FTC Act. The order is carefully drawn and provides that A&P shall cease and desist from continuing the illegal business practice in which it has engaged (App. 1019-20). The record shows, supra, pp. 7-75, that A&P knowingly induced Borden to enter into an agreement pursuant to which Borden supplied A&P private label milk at unlawfully discriminatory prices.

It is appropriate for the Commission to insure that, with respect to A&P's dealings with the suppliers, there exist some safeguards for the future. "The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices * * *." Jacob Siegel Co. v. FTC, 327 U.S. 608, 611 (1946). It "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952). "[T]hose caught violating the Act must expect some fencing in." FTC v. National Lead Co., 352 U.S. 419, 431 (1957). "[I]t is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

United States v. E. I. duPont de Nemours & Co., 366 U.S. 316, 334 (1961). These established principles have been repeatedly endorsed by this Court. See, e.g., Continental Wax Corp. v. FTC, 330 F.2d 475, 479 (2d Cir. 1964); Exposition Press, Inc. v. FTC, 295 F.2d 869, 874 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962); Hoving Corp. v. FTC, 290 F.2d 803, 806 (2d Cir. 1961); Consumer Sales Corp. v. FTC, 198 F.2d 404, 408 (2d Cir. 1952), cert. denied, 344 U.S. 912 (1953).

The order is not necessary, argues A&P (Pet. Br. 78), because in 1972 it terminated its supply arrangements with Borden. The argument is not persuasive. As the Commission observed (App. 1068) A&P's discontinuance of its supply arrangements with Borden took place four months after issuance of the Commission's complaint and five years after initiation of the investigation. A&P's reliance (Pet. Br. 78 n. 68) upon Jacoby-Bender, Inc., [1963-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,196 (1965), United States Rubber Co., 66 F.T.C. 387 (1964), and Oneida Ltd., 55 F.T.C. 1669 (1959), Commission decisions involving dismissal of a complaint where discontinuance of challenged practices preceded issuance of the complaint, and upon Argus Cameras, Inc., 51 F.T.C. 405 (1954), in which discontinuance took place immediately after service of the complaint, is therefore misplaced. Indeed, in Argus Cameras, Inc., the Commission observed that such a dismissal "is not the usual procedure" and should be granted only upon a clear showing of "unusual circumstances which in the interest of justice require it," 51 F.T.C. at 409. A&P has advanced no such showing in the instant proceeding.

Nor is the instant proceeding so dated as to be no longer in the public interest (Pet. Br. 79). A cease-and-desist order is clearly appropriate and there are no grounds to support as assertion of mootness even though the A&P's private label agreement with Borden was terminated in 1972. "The cogent and obvious reason is that there is no guarantee that the practice might not be resumed." Goodman v. FTC, 244 F.2d 584, 593 (9th Cir. 1957) (emphasis in original). Accordingly, this Court has found termination an insufficient ground for upsetting a Commission order where the unlawful practice was of sufficient magnitude and long duration. William H. Rorer, Inc. v. FTC, 374 F.2d 622, 626 (2d Cir. 1967). The termination of supply arrangements with Borden in 1972 and A&P's adoption of new purchasing policies are insufficient assurande that the unlawful inducement of discriminatory prices will not be repeated.

A&P's reliance (Pet. Br. 79) upon Columbia Broadcasting System, Inc. v. FTC, 414 F.2d 974, 982 (7th Cir. 1969), cert denied, 397 U.S. 907 (1970), where there were allegations of structural changes in the entire record industry, is misplaced. As the Commission observed (App. 1068), no significant change has taken place in the retail food industry in recent years, and there was no significant delay in the prosecution of this administrative proceeding. Moreover, because hearings began on June 11, 1973 (App. 919), less than two years after the October 8, 1971, issuance of the complaint, and a period

significantly shorter than the five-year periods which had elapsed after issuance of the complaints in American Bakeries Co., 68 F.T.C. 8, 13 (1965), Harney County Land Development Corp., 71 F.T.C. 12, 16 (1967), and Great Southwestern Land Co., 73 F.T.C. 440, 444 (1968), A&P's reliance upon these cases is also misplaced, (Pet. Br. 79). Similarly, the referenced changes in A&P's buying practices are in no way parallel to the respondent's contemplated withdrawal from the entire product market in Purex Corp., Ltd., [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 20,370 (FTC 1973). And A&P's changes were not ones which "'shook' the very foundations upon which distributional practices had rested for 40 years" as occurred in Tung-Sol Electric, Inc., 63 F.T.C. 632, 647 (1963), in which the Commission found industry changes so significant as to render resumption of the challenged practices impossible. 63 F.T.C. at 650-651. Nor do we find here practices "long discontinued" as were involved in FTC v. Civil Service T. Bureau, 79 F.2d 113, 116 (6th Cir. 1935). To the contrary, the fact that A&P benefited from the unlawful private label agreement throughout the course of the Commission's investigation to a point in time four months beyond the date of issuance of the complaint belies the implication of a good faith discontinuance of the unlawful practices.

Finally, The Firestone Tire & Rubber Co., 55 F.T.C. 1909 (1959), is readily distinguished. There the Commission dismissed the complaint only after the respondent had entered into an agreement with the Commission's staff to alter its advertising practices to conform to the Commission's recently promulgated Tire Advertising Guides, 55 F.T.C. at 1913.

Throughout its discussion, A&P appears to suggest that the mere discontinuance of an unlawful practice by a respondent after Commission issues a complaint should by itself operate as a bar to the subsequent issuance by the Commission of an appropriate cease-and-desist order. It is obvious that such a result would only serve to invite violations of the law until such time as the Commission would issue a complaint.

A&P next asserts (Pet. Br. 81-82) that the Commission's order improperly shifts the burden of going forward with the meeting competition defense. The argument lacks merit. The Commission specifically stated that "this provision comes into effect only when A&P knows or has reason to know that prices offered to it are lower than prices offered to others" (App. 1064). Accordingly, the burden imposed by the Commission's order is entirely consistent with the Supreme Court's ruling in Automatic Canteen. As A&P correctly notes (id.), the Supreme Court recognized (346 U.S. at 79 n.23) a distinction between the ease of access to evidence relating to the meeting competition defense as opposed to that relevant to the cost justification defense. In the former situation, the evidence might be more readily obtainable to

the buyer. Indeed, the Commission has so construed Automatic Canteen. See American Motor Specialties Co., 55 F.T.C. 1430, 1446-47 (1959), aff'd, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960).

As the Commission carefully explained (App. 1064-65) the order is reasonably related to the unlawful practice found to exist. Here the unlawful practice consisted of A&P's inducing an unlawful price discrimination when it knew from its possesion of Bowman's bid that the meeting competition defense was unavailable to it. The Commission in its order is doing no more than imposing a burden sanctioned by the Supreme Court in Automatic Canteen.

This Court's ruling in Federated Nationwide Wholesalers Service v. FTC, 398 F.2d 253, 260 (2d Cir. 1968), that the Commission exceeded its remedial powers in its order by shifting to the respondent the burden of proving the legitimacy of respondent's wholesale prices in a deceptive practices case brought under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, is inapposite to the instant proceeding involving Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f). The Commission has not arbitrarily shifted the burden of going forward with the meeting competition defense, but rather in its order has imposed a burden consistent with the doctrine of Automatic Canteen. Further, A&P's reliance (Pet. Br. 82) upon Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972), and FTC v. Sun Oil Co., 370 U.S. 505 (1963), is misplaced. While these decisions suggest

that the meeting competition defense would be available when a lower price is granted by a seller to a buyer to meet an equally low price granted by the seller's competitor to a competitor of the buyer, the ruling is no support for A&P's assertion that relevant evidence on the point is more readily available to the seller. Accordingly, A&P's argument that the Commission would be in a better position than the buyer to obtain evidence relating to the meeting competition defense is without substance.

A&P next complains (Pet. Br. 83-84) that by imposing a remedy nationwide in scope, the Commission's order is excessively broad. The law is to the contrary. The propriety of an alleged "broad order depends upon the specific circumstances of the case * * *." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394 (1965). The Commission's determination of the required scope of an order is not to be disturbed unless the order has no reasonable relation to the unlawful practices found. Jacob Siegel Co. v. FTC, supra, 327 U.S. at 613; FTC v. Mandel Bros., 359 U.S. 385, 392-93 (1959); Fedders Corp. v. FTC, 529 F.2d 1398, 1402 (2d Cir. 1976). "[T]he nature of the sanctions imposed must be left largely to the regulatory agency, and unless there are serious reasons for a limitation in the scope of the order, the courts will not interfere with the determination of the agency that respect." Wilson & Co. v. Benson, 286 F. 2d 891, 896 (7th Cir. 1961). See also Swift & Co. v. United States, 308 F.2d 849, 854 (7th Cir. 1962). The imposition of an order nationwide in scope does not constitute a clear abuse of

discretion necessary to warrant modification." Accordingly, National Dairy Products Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969), cited (Pet. Br. 83) in support of A&P's challenge to the nationwide scope of the Commission's order, is readily distinguished. The Commission's order therein only restricted the product coverage of the order involving this multi-product divisioned company. The nationwide scope of the order as to the products involved was left undisturbed. Instead the instant proceeding is more closely analogous to the factual situation in Beatrice Foods Co., 76 F.T.C. 719 (1969), aff'd sub nom., Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971), in which the court upheld a nationwide order against Kroger for its violation of Section 2(f) in a market area more limited than that involved in the instant proceeding. In the instant proceeding, the Commission found a nationwide order appropriate after considering "the frequency and durations of the violations, the business and competitive history of A&P, and the likelihood that A&P knew that it was violating the Robinson-Patman Act" (App. 1067). Further, the private label agreement with Borden was "initiated and supervised by A&P's New York dairy headquarters" (id.). The Commission may consider such factors in framing its order. Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 789 (D.C. Cir. 1965).

Citing (Pet. Br. 83) this Court's decision in ITT Continental Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976), A&P suggests that because it contains a remedy nationwide in scope, the Commission's order is unrelated to the unlawful practices found to exist. The assertion lacks merit. In ITT Continental, the Court modified the Commission's order because it covered alleged unlawful practices of which ITT Continental had been exonerated and other practices broader than those found to have been in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 45. The order in the instant proceeding, however, is directly related to A&P's practice of falsely inducing or receiving discriminatory prices in violation of Section 2(f) of the Clayton Act, 15 U.S.C. § 13(f). Accordingly, ITT Continental is not authority for restricting the Commission from entering a nationwide cease-and-desist order.

The order insofar as it curtails A&P's knowing inducement or receipt of discriminatory prices is reasonably related to the unlawful practices found to exist. Consequently, the provisions of its paragraphs are well within the Commission's discretion and should not be disturbed.

Finally, if A&P is sincerely concerned with the application or interpretation of particular paragraphs of the order, it may apply to the Commission for its views and advice. See Commission Procedures and Rules of Practice, Rules 1.1 and 3.61(d) (16 C.F.R. §§ 1.1 and 3.61(d)); FTC v. Colgate-Palmolive Co., supra, 380 U.S. 374, 394 (1965); FTC v. National Lead Co., supra, 352 U.S. at 431.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's order to cease and desist should be affirmed and enforced in its entirety.[28/]

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28/ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." 15 U.S.C. (Supp. V) § 45(c).

SUPPLEMENT A

Section 5 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 45, provides, in part, as follows:

> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Section 2 of the amended Clayton Act, 15 U.S.C. § 13, provides, in part, as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing mthods of quantities in which such commodities are to such purchasers sold or delivered * * *.
>
> (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., Petitioner, v. FEDERAL TRADE COMMISSION, Respondent.	No. 76-4179

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 1977, respondent's, Federal Trade Commission's, printed brief was served upon petitioner by mailing copies thereof, postage prepaid, to Denis I. McInerney, Esq., and Ira J. Dembrow, Esq., Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005.

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